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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-SEVENTH SESSION
(Vienna, 20 - 31 October 1997)

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INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the preparation of a uniform law on assignment in receivables financing. 1/ That was the fourth session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth session (New York, 14-25 July 1980) had decided to defer for a later stage. 2/

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission considered three reports by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Those reports concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. 3/

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374 - 381.

2/ Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28.

3/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

4. At its twenty-fourth session, the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report by the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16).

5. At its twenty-fifth session, the deliberations of the Working Group were based on a note prepared by the Secretariat, which contained provisions on a variety of issues, including form and content of assignment, rights and obligations of the assignor, the assignee, the debtor and other third parties, subsequent assignments and conflict-of-laws issues (A/CN.9/WG.II/WP.87).

6. At its twenty-sixth session, the Working Group considered a note prepared by the Secretariat, which contained a revised version of the draft Convention on Assignment in Receivables Financing (A/CN.9/WG.II/WP.89).

7. At its thirtieth session (1997), the Commission had before it the reports of the twenty-fifth and twenty-sixth sessions of the Working Group (A/CN.9/432 and A/CN.9/434). The Commission noted that the Working Group had reached agreement on a number of issues and that the main outstanding issues included the effects of the assignment on third parties, such as the creditors of the assignor and the administrator in the insolvency of the assignor. 4/

8. The Commission noted that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates, and expressed the hope that the Working Group, after three more sessions scheduled to take place at Vienna in October 1997, in New York in March 1998 (2-13 March 1998) and at Vienna in October 1998, would be able to submit the draft Convention for consideration by the Commission at its thirty-second session in 1999. 5/

9. The Working Group, which was composed of all States members of the Commission, held the present session at Vienna from 20 to 31 October 1997. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Poland, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

10. The session was attended by observers from the following States: Azerbaijan, Belarus, Canada, Costa Rica, Czech Republic, Democratic People's Republic of Korea, Georgia, Greece, Indonesia, Iraq, Ireland, Kuwait, Lebanon, Malaysia, Namibia, Oman, Pakistan, Philippines, Qatar, Republic of Korea, Romania, Sweden, Switzerland, Turkey and Venezuela.

4/ Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), para. 254.

5/ Ibid., para. 256.

11. The session was attended by observers from the following organizations: Association of the Bar of the City of New York (ABCNY), Bank for International Settlements (BIS), Commercial Finance Association (CFA), Hague Conference on Private International Law, Factors Chain International (FCI), Fédération Bancaire de l'Union Européenne, Interamerican Bar Association (IABA), International Bar Association (IBA) and Union Internationale des Avocats (UIA).

12. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Moses O. Adediran (Nigeria).

13. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.94) and a note by the Secretariat containing revised articles of the draft Convention on Assignment in Receivables Financing (A/CN.9/WG.II/WP.93).

14. The Working Group adopted the following provisional agenda:

1. Election of officers

2. Adoption of the agenda

3. Assignment in receivables financing

4. Other business

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

15. Recalling its decision to consider private international law issues at the beginning of the current session (A/CN.9/434, para. 262) and in view of the fact that those issues first arose in the context of draft article 23, one of the most important provisions of the draft Convention on which agreement had not been reached yet, the Working Group decided to begin its deliberations by discussing draft article 23.

16. The Working Group discussed draft articles 23 to 32, as well as the annex to the draft Convention, and draft articles 1 to 14(1) as set forth in document A/CN.9/WG.II/WP.93.

17. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapters III and IV. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 23 to 32, the provisions contained in the annex to the draft Convention and draft articles 1 to 14(1), as well as of the other provisions of the draft Convention.

III. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

Article 23. Competing rights of several assignees

18. The text of draft article 23 as considered by the Working Group was as follows:

"(1) Until the establishment of a registration system as provided in article 1 of the annex to this Convention, priority among several assignees of the same receivables from the same assignor [is determined on the basis of the time of the assignment] [will be governed by the law determined in accordance with paragraph (1) of article 28].

"(2) After the establishment of a registration system as provided in article 1 of the annex to this Convention, priority among several assignees of the same receivables from the same assignor will be governed by paragraphs (3) and (4) of this article. However, if a State makes a declaration under paragraph (1) of article 30, priority will be [determined on the basis of the time of the assignment] [governed by the law determined in accordance with paragraph (1) of article 28].

"(3) An assignee who has registered certain information about the assignment under this Convention has priority over another assignee of the same receivables from the same assignor who has registered later or not registered at all. If neither assignee registers, priority is determined on the basis of the time of the assignment.

"(4) An assignee asserting priority under the provisions of this Convention has priority over an assignee asserting priority based on grounds other than the provisions of this Convention. However, if the State the law of which is applicable under paragraph (1) of article 28 has made a declaration under paragraph (2) of article 30, priority will be determined on the basis of the time of the assignment.

"(5) Notwithstanding the preceding paragraphs of this article, conflicts of priority may be settled by agreement between competing assignees."

Paragraph (1)

19. The Working Group first considered the question whether a substantive or a conflict-of-laws approach would be preferable in addressing the problem of competing rights of several assignees.

20. It was generally agreed that a substantive law approach would be preferable, since it would provide more certainty. Support was expressed for both a substantive law priority rule based on the time of assignment and for a rule based on the time of registration.

21. Arguments in favour of a priority rule based on the time of assignment included that such a rule was simple, practical and conforming with legal tradition in a number of countries. In favour of a registration-based approach, a number of arguments were raised, including that

registration provided certainty and predictability, thus having a positive impact on the availability and the cost of credit. In addition, it was stated that, particularly in the case of successive assignments, the time of assignment might be difficult to ascertain. Adopting such a rule, it was observed, would make it necessary for the successive assignees to undertake costly verification as to the time of the first assignment, which might be incompatible with modern practice, particularly with respect to bulk assignments.

22. After discussion, the Working Group came to the conclusion that it would not be feasible to reach agreement on a substantive law provision and that an approach based on a conflict-of-laws provision should be examined. It was stated that, while such an approach could not lead to full uniformity, it could facilitate the extension of credit at more affordable rates. It was explained that, with the uncertainty prevailing as to the law applicable to questions of priority, assignees had to meet the requirements of a number of jurisdictions in order to ensure that they would obtain priority, a process which increased the cost of credit. It was observed that a clear conflict-of-laws provision could have a positive impact on the cost and the availability of credit, to the extent that it would allow assignees to know which law applied to questions of priority and to ensure their rights by meeting the requirements of the applicable law. In addition, it was pointed out that a conflict-of-laws rule would have the advantage of overcoming the problem of having to resolve conflicts between Convention and non-Convention assignees, since the matter would be left to the applicable law. Moreover, it was said that a conflict-of-laws rule might make the draft Convention more acceptable to States, at least, to the extent that national laws governing priority would be preserved.

23. However, the view was expressed that such an approach might result in conflicts between the draft Convention and the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; hereinafter referred to as the "Rome Convention"), whose article 12 dealt with the issue of assignment. In response, it was stated that the reference to a regional instrument applicable to contractual obligations such as the Rome Convention should not prevent the preparation of a specialized legal regime for universal application to receivables financing. In addition, it was stated that legal opinions varied greatly as to whether article 12 of the Rome Convention was applicable to questions of priority or to any other question relating to property rights. Furthermore, it was stated that article 21 of the Rome Convention expressly provided that the Convention did not "prejudice the application of international conventions" to which Contracting States might become parties.

24. The discussion next focused on whether priority among several assignees of the same receivables from the same assignor should be "governed by the law determined in accordance with paragraph (1) of article 28", i.e., "by the law governing the receivable to which the assignment relates" or "by the law of the country in which the assignor has its place of business".

25. Under one view, questions of priority should be governed by the law "governing the receivable to which the assignment relates". It was stated that such a rule would be in line with article 12 of the Rome Convention referring to the law which applied to the contract between the assignor and the debtor. The prevailing view, however, was in favour of adopting a rule under which priority would be governed by the law of the country in which the assignor had its place of business. It was stated that such a rule could provide the level of certainty sought by financiers, thus allowing for low-cost financing on the basis of receivables assigned in bulk, if

accompanied by a clear rule for the determination of the place of business of the assignor. In addition, it was observed that subjecting questions of priority to the law governing the receivable could have an adverse impact on the cost and the availability of credit, since assignees would have to examine each contract from which the receivable arose to determine the applicable law.

26. At the close of the discussion, the Working Group was reminded of the fact that paragraph (1) was intended to operate, "until the establishment of a registration system", as an "interim" priority rule, and, after the establishment of a registration system, as an alternative priority rule for those States that would not wish to be bound by the registration provisions of the draft Convention. In view of the objections to registration systems in a number of countries, it was suggested that a conflict-of-laws rule based on the assignor's place of business should be made the only binding priority rule in the draft Convention. Accordingly, the registration provisions, instead of being binding on all Contracting States, subject to possible reservations ("opting-out" mechanism), could be turned into a set of optional provisions, which Contracting States might freely choose to adopt ("opting-in" mechanism). Such a restructuring of the draft Convention was said to present the advantages of: leaving it to market practice to demonstrate the benefits of registration systems; enhancing the acceptability of the draft Convention; and simplifying a number of provisions of the draft Convention, such as draft article 23, whose paragraphs (2), (3) and (4) would no longer be needed in their current location.

27. While the Working Group generally felt that no final decision could be made at the current session, the proposal was met with considerable interest and support. Pending further discussion regarding the issues of priority, it was decided that paragraph (1) would be phrased along the following lines: "Priority among several assignees of the same receivables from the same assignor is governed by the law of the country in which the assignor has its place of business". It was agreed that appropriate explanation might be needed to clarify that the reference to "the law of the country in which the assignor has its place of business" should be interpreted as covering only the substantive law of that country to avoid possible renvoi situations.

Paragraphs (2), (3) and (4)

28. In view of the above decision, it was agreed that paragraphs (2), (3) and (4) would be placed at an appropriate place in the draft Convention for use by States that chose to "opt into" the registration system. It was agreed that the substance of those provisions might need to be reconsidered at a later stage.

Paragraph (5)

29. The substance of paragraph (5) was found to be generally acceptable.

Article 24 . Competing rights of assignee and insolvency administrator or creditors of the assignor

30. The text of draft article 24 as considered by the Working Group was as follows:

"(1) Until the establishment of a registration system as provided in article 1 of the annex to this Convention, priority between an assignee and the insolvency administrator or the assignor's creditors will be governed by [paragraph (3) of this article] [the law determined in accordance with paragraphs (2) and (3) of article 28].

"(2) After the establishment of a registration system as provided in article 1 of the annex to this Convention, conflicts of priority referred to in paragraph (1) of this article will be governed by paragraph (4) of this article. However, if a State makes a declaration under paragraph (1) of article 30, priority will be governed by [paragraph (3) of this article] [the law determined in accordance with paragraphs (2) and (3) of article 28].

"[(3) An assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

"(a) the receivables [were assigned] [arose] [were earned by performance] before the opening of the insolvency proceeding or attachment; or

"(b) the assignee has priority on grounds other than the provisions of this Convention].

"(4) An assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

"(a) the receivables [were assigned] [arose] [were earned by performance], and information about the assignment was registered under this Convention, before the opening of the insolvency proceeding or attachment; or

"(b) the assignee has priority on grounds other than the provisions of this Convention.

"(5) Except as provided in this article, this Convention does not affect the rights of the insolvency administrator or the rights of the assignor's creditors.

"[(6) This Convention does not affect:

"(a) any right of creditors of the assignor to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer;

"(b) any right of the administrator in the insolvency of the assignor,

"(i) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer,

"(ii) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the opening of the insolvency proceeding,

"(iii) to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract, or

"(iv) to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee;

"(c) [in case the assigned receivables constitute security for indebtedness or other obligations,] any insolvency rules or procedures generally governing the insolvency of the assignor:

"(i) permitting the insolvency administrator to encumber the assigned receivables with privileged claims for taxes, wages and similar privileges, provided that the assignee is treated fairly and equitably with other creditors whose receivables may be so encumbered,

"(ii) providing for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding;

"(iii) permitting substitution of the assigned receivables for new receivables of at least equal value,

"(iv) providing for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured, or

"(v) other rules and procedures of similar effect and of general application in the insolvency of the assignor [specifically described by a Contracting State in a declaration made at the time of signature, ratification, acceptance, approval of or accession to this Convention.]

"[(7) An assignee asserting rights under this article has no fewer rights than an assignee asserting rights under other law.]

"[(8) For the purposes of this article:

"(a) 'insolvency proceeding' means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of

the assignor are subject to control or supervision by a court for the purpose of reorganization or liquidation;

"(b) 'opening of an insolvency proceeding' is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final] [subject to appeal]; and

"(c) 'attachment' is deemed to have taken place when the order attaching the assigned receivables becomes effective, whether or not [final] [subject to appeal].]"

General comments

31. As a result of the decision of the Working Group on draft article 23 (see paras. 26-27 above), the Working Group decided that paragraph (1) of draft article 24 should include a private international law rule, paragraphs (2) and (4) should be moved to a part or annex to the draft Convention, the application of which would be optional, and paragraph (3) should be deleted.

Paragraph (1)

32. As to the contents of the private international law rule to be included in draft article 24, the Working Group agreed that competing rights of the assignee and the assignor's creditors should be distinguished from competing rights of the assignee and the administrator in the insolvency of the assignor.

33. With regard to conflicts of priority between the assignee and the assignor's creditors, the suggestion was made that they should be governed by the law of the country in which the assignor had its place of business. In support of that suggestion, it was stated that such an approach would provide the desirable degree of certainty, since the same law would apply irrespective of the country in which the assignor's creditors might obtain a court judgement ordering the attachment of the assigned receivables or of the country in which enforcement of the claims of the assignor's creditors might be sought.

34. While that suggestion was met with approval, a number of observations were made. One observation was that such an approach would deviate from what appeared to be the normal rule in a number of countries, i.e., a rule subjecting such conflicts of priority to the law of the country in which the debtor was located. In response, it was pointed out that an approach based on the law of the country of the debtor's place of business would not be appropriate, since draft article 24 dealt with competing rights of creditors of the assignor and not with the rights and obligations of the debtor. Another observation was that, while the suggestion was acceptable, the application of such a rule might result in the assignee not being able to obtain payment, unless the debtor was located in a Contracting State, simply because the assignee met the notification requirements of the applicable law but not those prevailing under the law of the debtor's country. Yet another observation was that the rule suggested could provide certainty only if parties could easily determine the relevant place of business of the assignor (e.g., if "place of business" meant the registered place of business).

35. As to conflicts between the assignee and the administrator in the insolvency of the assignor, the suggestion was made that they should also be governed by the law of the country in which the assignor had its place of business. In favour of that suggestion, it was pointed out that the place of business of the assignor as a connecting factor presented the advantage of simplicity and predictability for a number of reasons, including that: it provided a single point of reference; it could be ascertained at the time of even a bulk assignment; it would be suitable even to legal systems where registration was practiced; and it would result in the application of the law that would govern the insolvency proceedings of the assignor, if those proceedings were opened in the country of the assignor's place of business or in a country that would have adopted the draft Convention.

36. While there was support for the suggestion, the concern was expressed that the rule suggested might interfere with national insolvency rules or international conventions dealing with matters of insolvency (e.g., the European Union Convention on Insolvency Proceedings) that involved public policy considerations. In order to address that concern, the suggestion was made that the draft Convention should not deal with competing rights of the assignee and the administrator in the insolvency of the assignor.

37. That suggestion was objected to on the grounds that, unless the draft Convention provided some certainty and predictability as to the rights of the assignee in case of the insolvency of the assignor, it would have failed in addressing one of the most important problems in receivables financing and thus in reaching the goal of increasing the availability of lower-cost credit. In addition, it was stated that, while it was not clear whether the draft Convention was in conflict with any international convention dealing with matters of insolvency, such a conflict could be dealt with in the context of draft articles 9 and 29 dealing with the relationship between the draft Convention and other international conventions.

38. It was suggested that, before deciding on how to deal with the effects of the draft Convention on the law applicable to the insolvency of the assignor, the matter needed to be considered further in consultation with insolvency experts with a view to determining whether it would be preferable to: either leave the matter to the applicable law of the country of the assignor's place of business; or to deal with it in the draft Convention in great detail; or to deal with it only in general terms, thus deferring matters to the law applicable to the insolvency of the assignor.

39. After discussion, the Working Group decided that paragraph (1) should be revised to provide that competing rights of the assignee and the assignor's creditors should be governed by the law of the country in which the assignor had its place of business.

40. As to competing rights between the assignee and the administrator in the insolvency of the assignor, the Working Group tentatively decided that it should also be governed by the law of the country in which the assignor had its place of business. At the same time, the Working Group decided that the relationship between the draft Convention and the law applicable to the insolvency of the assignor should be further considered at a later stage (see paras. 41-43 below).

Paragraphs (5) and (6)

41. The Working Group considered the question whether paragraphs (5) and (6) should be retained or deleted. It was stated that, as mentioned above, three approaches were possible and should be considered at a later stage, after further consultation with insolvency experts (see paras. 38 and 40 above). One approach was to delete both paragraphs (5) and (6) and to leave the rights of the assignee as against the insolvency administrator to the law of the country in which the assignor had its place of business. Another approach was to retain paragraph (5) and to delete paragraph (6), dealing with the matter in general terms and thus effectively leaving it to the law applicable in case of insolvency of the assignor. Yet another approach was to delete paragraph (5) and to retain paragraph (6), thus dealing with the matter in a detailed manner.

42. One reason for retaining paragraph (5) or (6) was said to be that, if the insolvency proceeding were to be opened in a country other than the assignor's country, there would be uncertainty as to the rights of the assignee as against the insolvency administrator. Another reason in favour of retaining paragraph (5) or (6) was that insolvency rules of the forum might be applied, even if the applicable law was the law of the country in which the assignor had its place of business, vesting the insolvency administrator with rights that might not be available under the applicable law (e.g., to reorganize the assets and affairs of the insolvent assignor).

43. After consideration, the Working Group decided to retain both paragraphs (5) and (6) within square brackets.

Paragraphs (7) and (8)

44. Support was expressed in favour of the principle embodied in paragraph (7) that assignees asserting their rights on the basis of the draft Convention should not have any less rights than assignees asserting their rights on the basis of otherwise applicable law. Support was also expressed in favour of retaining paragraph (8), although the Working Group for lack of sufficient time did not go into a discussion of the definitions contained in paragraph (8). After discussion, the Working Group decided to retain both paragraphs (7) and (8).

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25. Subsequent assignments

45. The text of draft article 25 as considered by the Working Group was as follows:

> "(1) This Convention applies to international assignments of receivables and to assignments of international receivables by the initial or any other assignee to subsequent assignees, even if the initial assignment is not governed by this Convention.
>
> "[(2) A subsequent assignee has the rights afforded by this Convention to an assignee and is subject to the debtor's defences and rights of set-off recognized by this Convention.]

"[(3) A receivable assigned by the assignee to a subsequent assignee is transferred notwithstanding any agreement limiting in any way the assignor's right to assign its receivables. Nothing in this article affects any obligation or liability for breach of such an agreement, but the subsequent assignee is not liable for breach of that agreement.]

"(4) Notwithstanding that the invalidity of an assignment renders all subsequent assignments invalid, the debtor is entitled to discharge its obligation by paying in accordance with the payment instructions set forth in the first notification."

General comments

46. It was stated that draft article 25 was one of the most important articles of the draft Convention, in particular from the point of view of financiers involved in international factoring. It was explained that in international factoring the assignor assigned the receivables to an assignee in its own country (export factor) and the export factor assigned the receivables to an assignee in the debtor's country (import factor). In view of the fact that the debtor was normally notified only of the second assignment, it was necessary to provide that such notification constituted notification of the first assignment, in order to ensure the import factor's right to enforce the claim against the debtor. After discussion, the Working Group requested the Secretariat to add in draft article 25 a provision along the lines of article 11(2) of the UNIDROIT Convention on International Factoring (Ottawa, 1988; hereinafter referred to as "the Ottawa Convention"), which provided that "... notice of the subsequent assignment also constitutes notice of the assignment to the factor".

Paragraph (1)

47. Strong support was expressed in favour of the principle embodied in paragraph (1) that the draft Convention should apply to subsequent assignments falling under its scope of application, even if the initial assignment was not covered by the draft Convention (e.g., assignments in securitization transactions).

Paragraphs (2) and (3)

48. While support was expressed in favour of the principle embodied in paragraph (2) that a subsequent assignee was an assignee, the concern was expressed that singling out two types of situations in which that principle found application might inadvertently result in excluding other cases in which that principle should apply as well. In order to address that concern, the suggestion was made that paragraph (2) should be deleted.

49. With regard to paragraph (3), the concern was expressed that excluding the assignee's liability for a breach of an anti-assignment clause might be considered as an invitation to the assignor to violate its contractual obligations to the debtor, which would run against good faith principles. It was suggested that that concern could be discussed in the context of draft article 13 which involved issues similar to those arising in paragraph (3).

50. After discussion, the Working Group decided to retain paragraphs (2) and (3) within square brackets and deferred its discussion of paragraph (3) until it had completed its review of draft article 13.

Paragraph (4)

51. Support was expressed in favour of the principle that the invalidity of an assignment should not jeopardize the discharge of the debtor who paid in accordance with the instructions contained in the notification. It was agreed, however, that the matter involved the protection of the debtor in case any assignment, and not only a subsequent assignment, was invalid. After discussion, the Working Group requested the Secretariat to consider placing paragraph (4) elsewhere in the text, possibly in draft article 18.

CHAPTER VI. CONFLICT OF LAWS

A. General comments

52. The Working Group was reminded that the question of the scope of the conflict-of-laws rules would need to be considered. If these rules were aimed at filling the gaps left in the draft Convention, their scope of application should be limited to the scope of the draft Convention (and, in order to avoid a renvoi situation, they should apply only in case the forum was in a Contracting State and not by way of other conflict-of-laws provisions of the forum). If, however, the Working Group preferred to establish a uniform conflict-of-laws regime with regard to assignment, as suggested by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.II/WP.90, paras. 4-7), the scope of the conflict-of-laws provisions of the draft Convention should be broader than the scope of the draft Convention. Articles 1(3), 21 and 22 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995; hereinafter referred to as "the Guarantee and Standby Convention") constituted a precedent for such an approach.

53. Diverging views were expressed as to whether conflict-of-laws provisions should be included in the draft Convention or avoided altogether. In support of including conflict-of-laws rules in the draft Convention, it was stated that they could usefully operate as provisions leading to the application of the draft Convention (under draft article 1(1)(b)) or as specific rules dealing with issues that could not be addressed by way of a substantive law provision (e.g., priority). In addition, it was stated that including such provisions in the draft Convention presented the potential of achieving global unification and clarifying the applicable-law issue on assignments.

54. In favour of avoiding such rules, it was observed that they might inadvertently result in disunification, since they did not form a comprehensive legal regime unifying conflict of laws in assignments. In addition, it was stated that the inclusion of conflict-of-laws provisions might inadvertently result in inconsistencies between the draft Convention and the Rome Convention, which might make the draft Convention less acceptable to States Parties to the Rome Convention. In response, it was suggested that the draft Convention, as a set of specialized rules, could be expected to deviate from the general rules contained in the Rome Convention. The example was given of the 1955 Hague Convention on the Law Applicable to International

Sales of Goods, whose provisions differed from those of the Rome Convention and were not regarded as creating difficulties in that regard, since they merely reflected the well-established principle that a specialized instrument might derogate from a more general one. Furthermore, the view was expressed that the draft Convention might also be viewed as a unique opportunity to expand the benefit of useful conflict-of-laws provisions to countries that were not parties to the Rome Convention.

55. After discussion, the Working Group postponed its final decision as to whether Chapter VI should remain part of the draft Convention until it had further discussed the general scope of the draft Convention under draft article 1 (see paras. 140-145 below). Pending its final decision, the Working Group engaged in a discussion of the substance of the draft articles contained in Chapter VI.

B. Discussion of draft articles

Article 26. Law applicable to the rights and obligations of the assignor and the assignee

56. The text of draft article 26 as considered by the Working Group was as follows:

> "(1) [With the exception of matters which are settled in this Convention,] the [effectiveness] [validity] of an assignment as between the assignor and the assignee and the mutual rights and obligations of the assignor and the assignee are governed by the law [expressly] chosen by the assignor and the assignee.
>
> "(2) In the absence of a [valid] choice, the [effectiveness] [validity] of an assignment as between the assignor and the assignee and the mutual rights of the assignor and the assignee are governed by the law of [the country in which the assignor has its place of business] [the country with which the [contract of] assignment is most closely connected].
>
> "[(3) Unless the [contract of] assignment is clearly more closely connected with another country, it is deemed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the [contract of] assignment has, at the time of conclusion of the [contract of] assignment, its place of business]."

Paragraph (1)

57. It was generally agreed that the fundamental principle embodied in paragraph (1), i.e. unrestricted party autonomy for determining the law applicable to the contractual relationship between the assignor and the assignee, was appropriate. In that connection, the view was expressed that the draft Convention should include a provision to the effect that choice-of-law clauses could not be used by the parties to deviate from public policy or other mandatory law in their respective countries. It was suggested that such a provision might be derived from article 7 of the Rome Convention.

58. As to the specific wording of paragraph (1), it was generally agreed that the opening words ("[With the exception of matters which are settled in this Convention,]") should be retained in square brackets, pending a decision by the Working Group on the scope of the draft Convention.

59. As to the reference to either the "effectiveness" or the "validity" of the assignment, it was widely felt that the notion of "validity" might be unclear and entail various possible meanings. Furthermore, in practice, it was not uncommon for different laws to govern the validity of the assignment (or the "assignability" of a receivable), on the one hand, and the contractual relationship between the assignor and the assignee on the other hand. Preference was thus expressed for a reference to the "effectiveness" of the assignment. The prevailing view, however, was that a reference to either "effectiveness" or "validity" of the assignment might be unduly restrictive and that the principle of party autonomy should be more broadly recognized.

60. With respect to the reference to "the mutual rights and obligations of the assignor and the assignee", the view was expressed that such wording might unduly restrict the scope of the provision. While the expression was drawn from the Rome Convention with the intention to cover both the contractual and the proprietary effects of the assignment as between the parties thereto, it was generally agreed that clearer wording might be needed to indicate that the law chosen by the parties should govern not only their rights and obligations but also the entire assignment contract, and that it should also reach beyond the contractual sphere to govern the proprietary rights involved in the assignment. In that connection, it was stated that the Rome Convention might not constitute an appropriate model for drafting such a provision since the scope of the Rome Convention was limited to the contractual sphere. Doubts were expressed as to how it might be feasible for paragraph (1) to apply beyond the contractual sphere to the proprietary effects of the assignment. While it might be desirable for the law chosen by the parties to govern also, for example, transfer of property in the receivable as between the assignor and the assignee, it was a matter of debate whether issues such as assignability of a receivable and time of transfer might appropriately be governed by the law chosen by the parties. After discussion, the Working Group decided that the law chosen by the parties under paragraph (1) should apply to both the assignment contract and the proprietary effects of the assignment. The Secretariat was requested to prepare a revised draft to reflect the above discussion.

61. As to whether paragraph (1) should prescribe that the choice of law should be made "expressly" by the parties, various views were expressed. Under one view, it would be inappropriate for the draft Convention to deal with the modalities of the agreement where it should only focus on whether an agreement had been entered into by the parties. In support of that view, it was stated that any indication that the agreement should be "express" might raise difficult evidentiary issues, which could only be overcome by way of a detailed provision as to how evidence of the agreement might be given. Another view was that, for reasons of consistency with the legal tradition in certain countries and with certain international instruments, a reference to the "express" choice of the parties should be retained. As to how such a reference might be worded, it was recalled that, for example, under article 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; hereinafter referred to as "the Inter-American Convention"), the parties' agreement on the choice of applicable law "must be express or, in the event that there is no express

agreement, must be evident from the parties' behaviour and from the clauses of the contract, considered as a whole". After discussion, it was agreed that wording inspired from the Inter-American Convention should be included between square brackets for consideration by the Working Group at a future session.

Paragraphs (2) and (3)

62. Various views were expressed as to the options offered in paragraph (2) with respect to the designation of the law applicable in the absence of agreement by the parties. In favour of adopting as a default rule "the law of the country in which the assignor had its place of business", it was stated that such a law was easy to determine, thus enhancing certainty and predictability. In favour of retaining "the law of the country with which the assignment was most closely connected, it was stated that such a flexible rule would be more consistent with the legal tradition in a number of countries and with the Rome Convention. It was stated, however, that the characteristic performance might be either that of the assignor or that of the assignee depending upon the type of assignment envisaged, thus resulting in unacceptable uncertainty as to the law applicable.

63. It was generally agreed that, in most cases, adopting the law of the country in which the assignor had its place of business would be an acceptable solution. However, in view of the fact that a dispute was more likely to arise in a situation where parties had been unable to agree on the applicable law, it was generally felt that a degree of flexibility might be needed by the judge or the arbitrator who would subsequently deal with that dispute. In addition, providing for a degree of flexibility might constitute a useful incentive for the parties to agree on the applicable law under paragraph (1).

64. With a view to accommodating certainty as the main criterion and flexibility for dealing with exceptional situations, the Working Group decided that paragraphs (2) and (3) should be combined and embody: a reference to the law of the country with which the assignment was most closely connected; a presumption that the assignment was most closely connected with the law of the country in which the assignor had its place of business at the time of the conclusion of the contract of assignment; and a possibility to rebut that presumption in exceptional circumstances. As a matter of drafting, it was generally agreed that notions such as "effectiveness" and "validity" of the assignment should be avoided for the same reason they had been avoided in paragraph (1). The Secretariat was requested to prepare a revised draft of paragraphs (2) and (3) so as to reflect that decision.

Article 27. Law applicable to the rights and obligations of the assignee and the debtor

65. The text of draft article 27 as considered by the Working Group was as follows:

> "[With the exception of matters which are settled in this Convention,] the assignability of a receivable, the right of the assignee to request payment, the debtor's obligation to pay as instructed in the notification of the assignment, the discharge of the debtor and the debtor's defences are governed by the law [governing the receivable to which the assignment relates] [of the country in which the debtor is located]."

66. The Working Group decided to defer its discussion of the scope of draft article 27 until it had completed its discussion of the scope of the draft Convention.

67. It was generally agreed that the law governing the receivable to which the assignment related was preferable. The main advantage of such a rule was said to be that it followed the generally accepted principle that the assignment should not alter the position of the debtor, except to the extent permitted by the law under which the debtor undertook an obligation towards the assignor. In addition, it was pointed out that such a rule did not create difficulties in practice, since it was not unusual for the assignor and the assignee to specify in the assignment the law governing the receivable so as to avoid that the assignee would need to examine the transaction under which the assigned receivable might arise. Moreover, it was observed that application of the law of the country in which the debtor had its place of business would create difficulties in case of assignments in bulk involving debtors located in several countries.

68. It was noted that the law governing the receivable would normally be the law of the transaction under which the receivable arose (e.g., in case the receivable arose under a sales contract, the law applicable to the sales contract). However, the concern was expressed that, unless the draft Convention were to include provisions for the determination of the law applicable to the transaction under which the receivable arose, full uniformity could not be achieved, since each State would have to apply its own rules on the law applicable to contractual obligations in order to determine the law governing the receivable. It was observed that, in order to achieve full uniformity, the draft Convention would have to include additional provisions on the law applicable to non-contractual obligations, since the draft Convention covered non-contractual receivables as well.

69. After discussion, the Working Group decided that the law applicable to the rights and obligations of the assignee and the debtor should be the law governing the assigned receivable.

Article 28. Law applicable to conflicts of priority

70. The text of draft article 28 as considered by the Working Group was as follows:

"(1) The priority among several assignees obtaining the same receivables from the same assignor is governed by the law [governing the receivable to which the assignment relates] [of the country in which the assignor has its place of business].

"(2) The [priority between an assignee and] [the effectiveness of an assignment as against] the insolvency administrator is governed by the law [governing insolvency] [of the country in which the assignor has its place of business].

"(3) The [priority between an assignee and] [the effectiveness of an assignment as against] the assignor's creditors is governed by the law of the country in which the assignor has its place of business."

71. Differing views were expressed as to whether, after the decision of the Working Group to turn draft articles 23 and 24 into conflict-of-laws provisions dealing with questions of priority (see paras. 27 and 31 above), draft article 28 should be retained or deleted.

72. One view was that questions of priority were already addressed in draft articles 23 and 24 and that, as a result, draft article 28 was no longer necessary and could be deleted. A related view was that, while paragraphs (1) and (3) could be deleted, since the issues addressed therein had already been resolved in draft articles 23 and 24, paragraph (2) should be retained, since the issues addressed therein remained unresolved.

73. Yet another view was that a decision on the matter should be deferred until the Working Group had completed its discussion of the scope and the purpose of the conflict-of-laws provisions of the draft Convention. It was explained that, if the purpose of the conflict-of-laws provisions was to fill gaps in the draft Convention, draft article 28 would not be necessary, since draft articles 23 and 24 were conflict-of-laws rules and not substantive law provisions. However, if the conflict-of-laws provisions were to serve as uniform provisions relating to the application of the draft Convention under draft article 1(1)(b), draft article 28 would need to be retained as a whole.

74. After discussion, the Working Group decided, subject to further consideration of the matter in the context of its discussion on the scope of the draft Convention, to delete paragraphs (1) and (3) and to retain paragraph (2) within square brackets.

CHAPTER VII. FINAL PROVISIONS

Article 29. Conflicts with international agreements

75. The text of draft article 29 as considered by the Working Group was as follows:

> "A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that the Convention will not prevail over international conventions [or other multilateral or bilateral agreements] listed in the declaration, to which it has or will enter and which contain provisions concerning the matters governed by this Convention."

76. The Working Group decided to defer its discussion on draft article 29 until it had completed its discussion on draft article 9 dealing with the international obligations of Contracting States (see paras. 201-203 below).

Article 30. Registration

77. The text of draft article 30 as considered by the Working Group was as follows:

"(1) A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that it will not be bound by the registration provisions of this Convention.

"(2) A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that it will not be bound by paragraph (4) of article 23."

78. The Working Group noted that, as a result of its decision to make the application of the registration provisions subject to an opt-in clause (see para. 27 above), draft article 30 was no longer necessary and decided to delete it.

Article 31. Effect of declaration

79. The text of draft article 31 as considered by the Working Group was as follows:

"(1) Declarations made under article 29 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

"(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

"(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

"(4) Any State wh ı makes a declaration under articles 29 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary."

80. The Working Group took note of draft article 31 and decided to defer its discussion to a future session.

Article 32. Reservations

81. The text of draft article 32 as considered by the Working Group was as follows:

"No reservations are permitted except those expressly authorized in this Convention."

82. The Working Group took note of draft article 32 and decided to defer its discussion to a future session.

ANNEX TO THE DRAFT CONVENTION

A. General comments

83. The Working Group recalled its decision to turn the priority rules of the draft Convention (draft articles 23 and 24) into conflict-of-laws provisions and to make the registration provisions optional ("opt-in approach"; see paras. 26-27 and 31 above). The Working Group exchanged views as to the desirability of adopting only one priority system in the optional part of the draft Convention.

84. One view was that the optional part of the draft Convention should offer more alternatives to States. It was stated that including only a registration-based approach might give the impression that that was the preferred approach that States should adopt. It was pointed out that that result would run contrary to the fact that there were a number of concerns with regard to registration. Those concerns, it was said, included that registration might be costly, cumbersome, fall outside the supervision of the Government, increase the liability of banks, harm domestic practices (e.g., non-notification practices and practices involving a prolonged reservation of title) and disadvantage domestic creditors. It was, therefore, suggested that the optional part of the draft Convention should present another alternative priority rule, based on the time of assignment, which could read along the following lines:

> "1. If a receivable is assigned several times, the right thereto is acquired by the assignee whose assignment is of the earliest date.
>
> "2. The earliest assignee may not assert priority if it acted in bad faith at the time of the conclusion of the contract of assignment.
>
> "3. If a receivable is transferred by operation of law, the beneficiary of that transfer has priority over an assignee asserting a contract of assignment of an earlier date.
>
> "4. In the event of a dispute, it is for the assignee asserting a contract of assignment of an earlier date to furnish proof of such an earlier date."

85. Another view was that the optional part of the draft Convention should offer only one alternative based on registration, since registration was the only system that provided certainty and promoted competition among financing institutions, thus resulting in an increase in the availability of credit at a lower cost. All concerns, it was pointed out, relating to registration could be addressed, except a desire to limit competition. With regard to the concern that registration might affect domestic practices, such as those involving a prolonged retention of title (i.e. a retention of title which extended to the proceeds from the sale of the asset the title to which had been retained), it was stated that those practices could be carefully identified and be left to other priority rules.

86. In addition, it was observed that, if the optional part of the draft Convention offered a time-of-assignment rule as an alternative to a registration-based rule, it might inadvertently result in the time-of-assignment rule being considered as the best alternative to registration. It was stated that a time-of-assignment rule should be the last choice, since it provided the least

certainty to third parties, who had no way of verifying whether an earlier assignment had taken place other than by asking the assignor. In addition, it was pointed out that a time-of-notification rule would be preferable, if the Working Group were to provide an alternative priority rule, since it provided third parties the possibility of finding out about earlier assignments by asking the debtor. However, it was observed that a time-of-notification rule would be appropriate in case of assignments of single and present receivables, but not in case of bulk assignments involving future receivables.

87. After discussion, the Working Group requested the Secretariat to prepare and include in the optional part of the draft Convention alternative substantive-law priority rules.

88. The Working Group next turned to the question of registration as addressed in the annex. It was noted that the registration system envisaged the non-mandatory entering into a data base of certain information about the assignment. The purpose of such registration was not to create or evidence property rights, but to protect third parties by putting them on notice about assignments that had been concluded and to provide a basis for settling conflicts of priority. Such notice, it was noted, would give only enough information for the searcher to be forewarned and to decide whether to extend credit to a certain person and, if so, on what terms.

89. In addition, it was noted that priority under the draft Convention gave a creditor only the right to be paid before other creditors that were subsequent in the line of priority. Whether the creditor with priority would retain all the proceeds of the receivables depended on whether an outright assignment or an assignment by way of security was involved, a matter that was left to applicable law outside the draft Convention.

90. Because of its limited function, and in marked contrast to classic registration, registration under the draft Convention required the placement on public record of a very limited amount of data. That meant that a single notice could cover a large number of receivables, present or future, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured credit involved in modern financing (revolving credit). Such registration, it was noted, was inexpensive and simple, required no formalities and only a limited degree of supervision by the registrar.

91. Moreover, it was noted that the registration process (i.e. the entering, archiving and searching of data) could be fully or partly electronic. A purely electronic system (electronic data entry and electronic searching) would maximize efficiency and minimize human involvement, thereby permitting speed, availability at all hours, freedom from the risk of data entry error on the part of the registrar (which reduced its potential liability) and reduction in the cost of registration. A partly electronic system (submission of data in paper form and electronic searching) could also be accommodated, although it would require that the registrar enter the data into the data base, which would present a number of disadvantages, including an increase in the risk of error and in the registrar's potential liability.

92. The example was given of a national registration system that was fully electronic. It was observed that the system was operating on the basis of personal property security laws. Under that system, users with a password given from the registry had direct access to the registry's data base through a personal computer and could enter data and search the record of the registry directly. It was explained that, in order to register a transaction, users had to fill

out a form appearing on the computer screen identifying the assignor, the assignee, the encumbered assets and the duration of the registration. It was observed that the risk of errors in the registration was on the registering party, since the registrar was not involved at all.

93. When completing the registration, a user could print out a statement verifying the fact of registration. It was pointed out that that verification statement was admissible in court and was prima facie evidence of the fact of registration. It was stated that the cost of registration was 5 US dollars per year for a registration of a duration between one and twenty-five years as selected by the registrant, and that one registration could refer to several assignments and several receivables. With regard to searches of the records of the registry, it was stated that users having direct access could check the records by the name of the assignor and print-out a search report that was admissible in court as prima facie evidence of its contents.

B. Discussion of draft articles

Article 1. Establishment of a registry

94. The text of draft article 1 of the annex as considered by the Working Group was as follows:

> "At the request of not less than one third of the Contracting States, the depositary shall convene a conference for designating a registry or registries and enacting[, revising or amending] registration regulations for the registration of data about assignments under this Convention."

95. It was noted that, after the Working Group's decision to turn the annex into an optional part of the draft Convention (see para. 27 above), there was no need to provide for a conference for the establishment of a registration system. States wishing to adopt a registration system could do so on their own, establishing a national or international system or a combination of both. In addition, it was noted that, as a result of the same decision of the Working Group, the priority provisions deleted from draft articles 23 and 24 would have to be included in the annex.

96. General support was expressed for the principle that, while the draft Convention should include some basic provisions about registration, the mechanics of the registration process should be left to be dealt with in a set of regulations that could be prepared by the registrars. It was stated that, under such an approach, the flexibility necessary for the system to respond to changing needs and technologies would be preserved.

97. The view was expressed that only a system based on national registries, in which both national and international transactions would be registered at the national level, could avoid duplication and properly address the conflict between domestic and foreign assignees. In addition, it was stated that a system based on an international registry, in which only assignments of receivables would be registered, would not be cost-efficient. While it was agreed that a system based on national registries would be one of the ways in which the registration system could operate, it was pointed out that national registries could be linked

with an international registry. In addition, it was pointed out that, for the various national registries to be compatible with each other, it was essential to agree on standardized registration forms. It was observed that such forms were being prepared at the national level and that international standardization of such forms would be desirable. In that connection, the Secretariat was encouraged to establish links with the organizations involved in the field of standardization of forms and examine with them the possibility of preparing a standard registration form.

98. After discussion, the Working Group requested the Secretariat to revise draft article 1 of the annex so as to allow the necessary flexibility for the registration provisions to apply in the context of any registration system, national or international.

Article 2. Duties of the registry

99. The text of draft article 2 of the annex as considered by the Working Group was as follows:

> "(1) The registry receives data registered under this Convention and the regulations and maintains an index by the name of the assignor [and the registration number] in order to be able to make the data available to searchers upon request.
>
> "(2) Upon receipt of data, the registry shall assign a registration number and issue and send to the assignor and the assignee a verification statement in accordance with the regulations.
>
> "(3) Upon receiving a search request, the registry shall issue a search result in writing listing all data registered with regard to the receivables of a particular person.
>
> "(4) Upon expiration of the period of effectiveness of a registration, or receipt of a notice by the assignee or a court order issued under article 5 of the annex to this Convention, the registrar shall remove data registered from the public records of the registry."

100. While general support was expressed for the principles embodied in draft article 2 of the annex, a number of suggestions were made. One suggestion was that the registry should maintain an index by assignor and leave it to the regulations to specify how the assignor would be identified. Various options mentioned for the identification of the assignor included the legal name of the assignor and a registration number the use of which could help overcome language problems.

101. With regard to court jurisdiction, it was noted that priority disputes could be left to be resolved by the courts with jurisdiction over the parties to the dispute. However, it was noted that, in order to avoid that conflicting orders would be addressed to the registry, it may be desirable to have only one court with jurisdiction over the registry. It was stated that, in case of a system based on national registries, national courts should have jurisdiction to issue orders to the registrar. In addition, it was observed that, in case of a system based on an international registry, it could be specified that no court had jurisdiction over the international registry and

that disputes involving orders to the registrar should be resolved through an arbitration process that would need to be specified. It was noted that the latter approach was followed in the context of the draft Convention on International Interests in Mobile Equipment currently being prepared by the International Institute for the Unification of Private Law ("UNIDROIT").

102. As to the issue of liability of the registrar for errors, it was stated that, in a fully electronic system in which the parties would have direct access to the registry and would be able to effect a registration themselves, the risk of error would be on the registering party and not on the registrar. In a partly electronic system in which the registrar would receive a paper notice which would need to be entered into the registry's data base, the risk of error on the part of the registrar, and thus its potential liability, would be higher. However, it was observed that experience gained at the national level showed that there were very few cases in which the issue of liability of the registrar arose. In addition, it was pointed out that the matter could be effectively dealt with if a percentage of the registration fee were to be used to establish a fund from which liability claims could be paid.

103. After discussion, the Working Group approved the substance of draft article 2 of the annex and requested the Secretariat to revise it in order to address the suggestions made.

Article 3. Registration

104. The text of draft article 3 of the annex as considered by the Working Group was as follows:

> "(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the legal name and address of the assignor and the assignee and a brief description of the assigned receivables.
>
> "(2) Registration is effective from the time that the data referred to in paragraph (1) are available to searchers.
>
> "(3) Data may be registered before or after an assignment is made.
>
> "(4) Data registered may relate to one or more assignments and to receivables not existing at the time of registration.
>
> "(5) Any defect, irregularity, omission or error with regard to the legal name of the assignor that results in data registered not being found upon a search based on the legal name of the assignor renders the registration ineffective."

Paragraph (1)

105. It was noted that proof of authorization of the registration by the assignor was not part of the data that needed to be registered, since normally lenders obtained such authorization

before extending credit and the assignor, in the absence of authorization, could request that the data registered be removed or amended (draft article 5 of the annex).

106. The concern was expressed that the assignor's interests could be prejudiced if any person was able to register without proof of authorization. In order to address that concern, a number of suggestions were made. One suggestion was that, in the absence of automatic deregistration under draft article 5 of the annex, it could be provided that, in case of a dispute as to the accurateness of the registered data, a notice should be filed alerting searchers of the dispute. Another suggestion was that, in case the assignor disputed the authorization of the registration, the registrar should request the assignee to produce adequate proof of authorization. If the assignee failed to produce such proof within fifteen days, the registrar should remove the registration from the public record. While the former suggestion was found to be acceptable, the latter suggestion was objected to on the grounds that it might result in the assignee losing its priority just because the assignor submitted a request in bad faith and the assignee did not respond properly within the fifteen-day period.

107. With regard to the description of the receivables, it was suggested that "a brief description" might be necessary only in case not all receivables were assigned; when all receivables were assigned, a reference to "all receivables" should be sufficient.

108. After discussion, the Working Group approved the substance of paragraph (1) and requested the Secretariat to revise it so as to address the suggestions made.

Paragraph (2)

109. It was observed that a rule along the lines of paragraph (2) making registration effective as of the time the data registered became available to searchers would be appropriate in case of the original extension of credit, where credit could be withheld until the data registered became available to searchers. However, in case of restructuring of troubled credits, where it was essential to make the credit available in a timely manner, registration might need to be effective once it was made, i.e. even before the data registered became available to searchers. It was pointed out that the problem arose only in partly electronic systems, since in fully electronic systems data would be made available to searchers upon completion of the entry of data by the registering party. Subject to that change, the Working Group approved the substance of paragraph (2).

Paragraphs (3) and (4)

110. The Working Group found paragraphs (3) and (4) to be generally acceptable.

Paragraph (5)

111. The suggestion was made that in paragraph (5) reference should be made to "the assignor" and not to "the legal name of the assignor". It was observed that the matter could be specified further in the regulations, in order to preserve the flexibility of the registration provisions in the draft Convention and to avoid linking those provisions with any particular search logic or software. Subject to that change, the Working Group approved the substance of paragraph (5).

Article 4. Duration, continuation and amendment of registration

112. The text of draft article 4 of the annex as considered by the Working Group was as follows:

"(1) A registration under this Convention is effective [for a period of five years after registration] [for the period of time specified by the registering party].

"(2) A registration may be renewed for successive additional periods if it is requested six months before expiry of the period of its effectiveness for an additional period of [five years] [time specified by the registering party].

"(3) A registration may be amended at any time during the period of its effectiveness. The amendment is effective from the time it becomes available to searchers."

113. While the Working Group found draft article 4 of the annex to be generally acceptable, a number of suggestions were made. One suggestion was that paragraphs (1) and (2) could be combined so that parties could specify the time during which the registration should remain effective, and, if they failed to do so, the registration would remain effective for five years. Another suggestion was that there should be no limit to the duration of the effectiveness of registration. That suggestion was objected to on the grounds that the benefit derived from purging the public record outweighed the risk that assignees may lose their priority rights which the assignees could protect by renewing their registrations. As to the exact time of the duration of registration, it was stated that it depended on the average life of a financing agreement. Yet another suggestion was that draft article 4 of the annex should provide that changes in the name of the assignor or in the title to the receivables should be registered.

114. After discussion, the Working Group approved the substance of draft article 4 of the annex and requested the Secretariat to revise it so as to address the suggestions made.

Article 5. Right of the assignor to remove or amend data registered

115. The text of draft article 5 of the annex as considered by the Working Group was as follows:

"(1) The assignor may demand in writing that the assignee register a notice removing or amending the data registered. [The assignor shall state explicitly the nature of the action requested and the grounds for its request].

"(2) If the assignee fails to comply with such demand within fifteen days of its receipt, the assignor may request a competent court to order that the data registered be removed or amended on the ground that they refer to receivables in which the assignee has no interest or has a different interest."

116. There was general agreement that a rule providing for automatic deregistration would not be appropriate. It was stated that the assignor could be protected from inaccurate

registrations through other means, such as the registration of a notice warning parties that there was a dispute as to the registration and a rule providing for penalties against assignees for inaccurate registrations. In addition, it was stated that the registration did not necessarily affect the creditworthiness of the assignor, since it provided only notice of the possibility that a financing transaction had been concluded and did not require that the amount of the secured credit should be disclosed. On the other hand, it was pointed out that automatic deregistration would expose the assignee to the risk of losing its priority, if it did respond in a timely manner to an erroneous or mischievous demand by the assignor. That risk, it was said, would be even greater in case of a demand made on the eve of insolvency and could affect the cost of credit.

117. As to the court that should be given jurisdiction to issue an order to a registrar to discharge or amend a registration, various suggestions were made. One suggestion was that the courts of the country in which the assignor had its place of business should be given jurisdiction (see para. 101 above). Such an approach, it was stated, would be compatible with a system based on national registries, since registration would normally be effected at the place of business of the assignor. In addition, such an approach would be compatible with draft articles 23 and 24 providing that the law of the country in which the assignor had its place of business applied to questions of priority. Another suggestion was that disputes involving the issuance of orders to the registrar could be settled through arbitration. It was observed that such an approach would be preferable in particular in case an international registration system were to be established, since it would result in avoiding the issuance of possibly conflicting orders to the registrar by national courts. Another suggestion was that requests of assignors relating to the discharge or correction of registrations could be left to the registrar, at least at the first instance.

Article 6. Registry searches

118. The text of draft article 6 of the annex as considered by the Working Group was as follows:

> "(1) Any person may search the records of the registry and obtain a search result in writing.
>
> "(2) A search may be conducted according to the name of the assignor [or the registration number].
>
> "[(3) A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:
>
> > "(a) the date and time of registration; and
> >
> > "(b) the order of registration as indicated in the registration number referred to in the written search result.]"

119. It was noted that paragraph (1) provided for a registry open to the public. The concern was expressed that allowing access to data about financing transactions to the public might

prejudice the rights of assignors. In order to address that concern, it was suggested that access to the registry be limited to "any person having interest". That suggestion was objected to on the grounds that normally the amount of the data available on public record was so limited that their disclosure could not negatively affect the interests of assignors. In addition, it was pointed out that the advantage of increased access to lower cost credit outweighed the perceived disadvantage of insufficient privacy for assignors. However, it was stated that States could be given the flexibility of limiting access to the data registered only to certain categories of parties. After discussion, the Working Group approved the substance of draft article 6 unchanged.

TITLE OF THE DRAFT CONVENTION

120. Differing views were expressed as to whether the notion of "financing" in the title should be retained or deleted. One view was that the notion of "financing" should be deleted. It was stated that a title without a reference to the notion of "financing" would be in line with the content of the draft Convention, since that notion was not used for defining the scope of the draft Convention in draft article 1 but only appeared in the title, the preamble and in draft articles 5(4) and 15(3). In addition, it was observed that, in view of the fact that the title might serve for interpretation purposes and that the draft Convention was to cover assignments made outside a financing context, use of the notion of "financing" in the title might be misleading.

121. The prevailing view, however, was that the notion of "financing" in the title should be retained. It was observed that such a title would accurately reflect the main objective of the draft Convention, as expressed in the preamble, to provide a uniform legal regime that would promote the availability of credit at more affordable rates. In addition, it was pointed out that such an approach would be consistent with the decision of the Working Group to focus on assignments made in a financing context without being precluded from covering a wider range of assignments as long as no attempt was made to cover all assignments (A/CN.9/432, paras. 18 and 66). In addition, it was said that adopting a title such as "draft Convention on assignment of receivables" might lead to the draft Convention being misinterpreted as covering the entire field of assignment, thus compromising the acceptability of the draft Convention in countries that did not intend to alter the law of assignments in general.

122. After discussion, the Working Group decided to retain the title of the draft Convention unchanged. It was agreed that the issue of consistency between the title, objectives and contents of the draft Convention might need to be reconsidered at the final stage of the preparation of the draft Convention.

PREAMBLE

123. The text of the preamble to the draft Convention as considered by the Working Group was as follows:

"The Contracting States,

"Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

"Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote the availability of credit at more affordable rates,

"Have agreed as follows:"

124. The Working Group found the substance of the preamble to be generally acceptable.

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

125. The text of draft article 1 as considered by the Working Group was as follows:

"(1) This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this Chapter:

"(a) if, [at the time of the assignment,] the assignor and the assignee have their places of business in a Contracting State; or

"(b) if the rules of private international law lead to the application of the law of a Contracting State.

"[(2) The provisions of articles 26 to 28 apply [to assignments of international receivables and to international assignments of receivables as defined in this Chapter] independently of paragraph (1) of this article.]"

Paragraph (1)

Opening words

126. It was noted that the opening words of draft article 1 reflected the decision made by the Working Group at its previous two sessions that the substantive scope of the draft Convention should be broadly drafted to cover both assignments of international receivables and international assignments of domestic receivables, thus excluding only domestic assignments of domestic receivables ((A/CN.9/432, para. 24 and A/CN.9/434, para. 18).

127. As regards domestic receivables, the concern was expressed that their assignment raised different issues from the assignment of international receivables and, accordingly, if covered by the draft Convention at all, should be made subject to a different set of rules. Another concern was that applying two competing legal regimes to domestic receivables, depending upon the domestic or the international character of the assignment, would raise difficulties (e.g., a conflict between a domestic and a foreign assignee of domestic receivables). Yet another

concern was that covering domestic receivables might expose the debtor to the risks associated with the obligation to pay a foreign assignee.

128. The prevailing view, however, was that, in the absence of concrete examples showing the need to treat different types of assignment differently, the mere fact that assignments of international receivables were practiced in the context of transactions (e.g., factoring) that were different from transactions involving international assignments of domestic receivables (e.g., securitization) was no reason to treat those two types of assignment differently. In addition, it was stated that the risk of a conflict between the two legal regimes was mostly theoretical, in particular after the decision of the Working Group to turn draft articles 23 and 24 into conflict-of-laws rules.

129. Moreover, it was pointed out that the concerns relating to the rights and obligations of the debtor could be addressed by an adequate debtor-protection system to be included in the draft Convention. Those concerns, it was added, could not justify the exclusion of the international assignment of domestic receivables from the scope of the draft Convention, in particular in view of the possibility that including such assignments in the scope of the draft Convention could provide debtors increased access to international financial markets, and thus to lower-cost credit.

130. After discussion, the Working Group confirmed its previous decision by retaining the opening words of paragraph (1) unchanged.

Subparagraph (a)

131. At the outset, it was suggested that the Working Group might consider restructuring subparagraph (a) to distinguish between the various relationships between parties to a typical assignment. While it was generally agreed that those various relationships should be borne in mind when discussing the scope of the draft Convention, it was widely felt that it would be impractical to attempt restructuring draft article 1 to cover separately the many possible relationships or conflict situations (assignor-assignee, assignee-debtor, assignee-assignee, assignee-assignor's creditors, assignee-insolvency administrator).

132. It was generally agreed that, for the draft Convention to apply, only the assignor needed to have its place of business in a Contracting State. It was stated that a requirement that the assignee be also located in a Contracting State would create uncertainty as to the application of the draft Convention, since a potential financier could not predict whether there would be competing assignees from non-Contracting States, the conflict of priority with whom would not be subject to the draft Convention. Such uncertainty as to the applicable law to conflicts of priority, it was said, could raise the cost or decrease the availability of credit, a result that would run contrary to the main objective of the draft Convention. In addition, requiring the assignee to be located in a Contracting State for the draft Convention to apply would produce inconsistent results. For example, a conflict of priority among several assignees obtaining the same receivables from the same assignor, or the assignment to a syndicate of assignees, would be subject to a different legal regime, depending on the country in which the assignees would be located. Moreover, it was widely felt that deleting the reference to the place of business of

the assignee from subparagraph (a) would appropriately broaden the scope of the draft Convention.

133. The discussion next focused on whether, in addition to the assignor, the debtor should have its place of business in a Contracting State for the draft Convention to apply. Differing views were expressed. One view was that the debtor should also be located in a Contracting State. It was stated that such an approach would allow the debtor to know whether the draft Convention applied and to avoid situations in which the debtor's rights and obligations would be made subject to a different legal regime, simply because the assignor chose to make an international assignment.

134. The prevailing view, however, was that the debtor did not need to be located in a Contracting State for the draft Convention to apply, with the exception of those provisions that dealt with the rights and obligations of the debtor (e.g., draft articles 13, 14 and 18-22). It was stated that such an approach could enhance predictability as to the application of the draft Convention with regard to the debtor, without unduly limiting the application of the draft Convention as a whole. In addition, it was pointed out that such an approach would be consistent with normal practice, since, even if the draft Convention were to apply in case the debtor were not in a Contracting State, it could not change those debtor-protection provisions of the applicable law that were of a mandatory nature (e.g., the rules on notification of the debtor). Moreover, it was observed that such an approach would be beneficial to the assignor and the assignee to the extent that they could predict whether, having met the requirements of the draft Convention, they could enforce their claim against the debtor.

135. It was generally agreed that the reference to the time at which the assignor needed to be located in a Contracting State, which appeared within square brackets in subparagraph (a), enhanced certainty in the application of the draft Convention and should be retained.

136. After discussion, the Working Group decided that only the assignor needed to have its place of business in a Contracting State for the draft Convention to apply. At the same time, it was decided that for the application of those provisions that dealt with the rights and obligations of the debtor, the debtor too needed to have its place of business in a Contracting State. As to which those exceptional provisions would be, the Working Group decided to defer its decision until it had completed its discussion of the draft Convention as a whole.

Subparagraph (b)

137. Differing views were expressed as to whether subparagraph (b) should be retained or deleted. One view was that subparagraph (b) should be retained. It was stated that provisions along the lines of subparagraph (b) existed in other international conventions prepared by UNCITRAL (e.g., article 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods, and article 1(1)(b) of the Guarantee and Standby Convention) and that reference to the rules of private international law was generally regarded as a useful extension of the scope of application of those conventions. In addition, it was observed that the uncertainty that might stem from disparities among applicable private international law rules would not be avoided by limiting the applicability of the draft Convention, since the rules of private international law also applied outside the scope of the draft Convention. For example, if private international law rules led to the application of the law of a Contracting State and

subparagraph (b) were to be deleted, the law applicable would have to be the law governing domestic assignments, which might also be regarded as a factor of uncertainty.

138. A related view was that the present broad reference to the rules of private international law contained in subparagraph (b) could be replaced by a more specific indication of the private international law rules envisaged (e.g., the draft Convention should apply if the contract of assignment was governed by the law of a Contracting State, or if both the original contract and the contract of assignment were governed by the law of a Contracting State; see article 2 (1)(b) of the Ottawa Convention).

139. The prevailing view, however, was that subparagraph (b) should be deleted. It was stated that the level of uncertainty resulting from the reference to the rules of private international law was unacceptable in view of the fact that the draft Convention was intended to apply not only to the contractual aspects of the assignment but also to the transfer of proprietary rights in the context of a complex, multi-party transaction, which was found to justify departing from provisions adopted in previous conventions. In addition, it was observed that the scope of the draft Convention as defined under subparagraph (a) was so broad that no further extension by reference to any rule of private international law was needed. After discussion, the Working Group decided to delete subparagraph (b).

Paragraph (2)

140. The Working Group recalled its decision to consider the purpose or the scope of Chapter VI (draft articles 26-28) after it had completed its discussion of the scope of application of the draft Convention (see para. 55 above) and, in that context, considered the question whether paragraph (2) should be retained or deleted.

141. It was pointed out that one possible function of Chapter VI was to introduce a degree of certainty as to the application of the draft Convention under draft article 1(1)(b), by providing a set of uniform private international law rules that could trigger the application of the draft Convention. In view of the decision by the Working Group to delete draft article 1(1)(b), it was agreed that Chapter VI could no longer fulfill that function.

142. Another function, it was said, that Chapter VI could fulfill was to provide an additional layer of harmonization of law in the field of assignment by supplying the rules to be followed by courts of Contracting States in identifying in any given case the law applicable to an assignment. Should the Working Group decide to follow such an approach, paragraph (2) would be useful in extending the scope of application of Chapter VI to cover assignments, irrespective of whether they were connected to a Contracting State or not. In such a case, Chapter VI would apply whether or not in a particular case it turned out that the draft Convention was the applicable substantive law for the assignment in question. It was noted that paragraph (2) was inspired from the approach taken in article 1(3) of the Guarantee and Standby Convention.

143. In that connection, the view was expressed that, if Chapter VI were to constitute what was referred to as a "mini convention" on private international law, as distinct from the main substantive provisions of the draft Convention, the "mini convention" should be made optional

for parties to the main provisions, and should also be somewhat expanded to deal in more detail with issues of private international law. Such an approach would overcome the difficulties arising from possible conflicts with other international conventions dealing with the law applicable to assignments. In addition, it would allow States that might be parties to such other conventions to adopt the draft Convention without the optional Chapter VI.

144. Should the Working Group decide not to attempt harmonizing conflict-of-laws rules along those lines, it was observed, paragraph (2) would no longer be needed. In such a case, the only remaining function of Chapter VI would be to provide for a gap-filling mechanism for matters not expressly settled in the draft Convention (draft article 8(2)).

145. In view of the decision made by the Working Group with respect to draft article 23 (see para. 27 above), the Working Group was generally agreed that further consultations would be required in order to determine the purpose of Chapter VI, and decided to retain paragraph (2) within square brackets, for consideration at a future session.

Article 2. Assignment of receivables

146. The text of draft article 2 as considered by the Working Group was as follows:

> "(1) For the purposes of this Convention, 'assignment' means the transfer by agreement from one party ('assignor') to another party ('assignee') of its right to payment of a monetary sum ('receivable') owed by another party ('debtor') in return for value, credit or related services given or promised by the assignee to the assignor.
>
> "(2) 'Assignment' includes the transfer of receivables by way of security for indebtedness or other obligation, or by any other way, including subrogation by agreement, novation or pledge of receivables."

Paragraph (1)

147. While general support was expressed in favour of the substance of paragraph (1), a number of suggestions of a drafting nature were made. One suggestion was that the words "to the assignor" at the end of paragraph (1) should either be deleted or be supplemented by the words "or to another person" in order to avoid excluding from the scope of the draft Convention assignments in which value, credit or related services were given or promised not to the assignor but to another person affiliated with the assignor or to whom the assignor owed a debt. Another suggestion was that the words "at any time" should be included after the word "promised" in order to ensure that assignments for value, credit or services received not at the time of assignment but at an earlier time would be covered by the draft Convention (e.g., workouts of debts).

148. Yet another suggestion was that the words "in return for value, credit or related services given or promised by the assignee to the assignor" should be deleted, since they related to the financing transaction and not to the assignment proper. That suggestion was objected to on the grounds that giving or promising value, credit or related services was part of the assignment and not only of the financing contract. In addition, it was stated that those words should be

retained as they usefully clarified that an assignment made not for financing purposes but for the purpose of providing financing-related services would be covered by the draft Convention.

149. In response to a question, it was observed that an assignment aimed solely at relieving the assignor from recourse in case of debtor-default would be covered, under the present formulation of paragraph (1), as an assignment made "for value". In response to another question, it was stated that the current formulation of paragraph (1) clarified sufficiently that both the contract of assignment and the resulting transfer of receivables were covered by the definition of "assignment".

150. After discussion, the Working Group approved the substance of paragraph (1) and requested the Secretariat to revise it in order to reflect the suggestion referred to in para. 147.

Paragraph (2)

151. While the Working Group found paragraph (2) to be acceptable, it decided that the indicative list of types of transfers contained therein should be deleted. It was stated that the list was unnecessary, since paragraph (2) clarified that all types of transfers of receivables were covered. In addition, it was observed that the list might inadvertently result in excluding some types of assignment from the scope of the draft Convention, since it was not exhaustive. Moreover, it was pointed out that novation did not involve the transfer but rather the extinction of a receivable and the creation of a new receivable.

152. It was observed that the words "the transfer of receivables by way of security" might inadvertently result in excluding assignments involving not the transfer of title for security purposes but the mere creation of a security interest. In order to ensure that such security assignments would be covered by the draft Convention, it was suggested that reference should be made to the transfer as well as to the creation of a security right in receivables.

153. Subject to that change and to the deletion of the indicative list of types of transfers of receivables, the Working Group approved the substance of paragraph (2).

Article 3. Internationality

154. The text of draft article 3 as considered by the Working Group was as follows:

> "(1) A receivable is international if, at the time it arises, the places of business of the assignor and the debtor are in different States. An assignment is international if, at the time it is made, the places of business of the assignor and the assignee are in different States.
>
> "(2) For the purposes of this Convention:
>
> > "(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract [or other agreement or court order giving rise to the assigned receivable];

"(b) if a party does not have a place of business, reference is to be made to its [registered office or] habitual residence."

Paragraph (1)

155. The Working Group first focused on the question of the time at which the internationality of a receivable should be determined. In order to avoid covering a receivable which at the time it arose was international but at the time of the conclusion of the contract of assignment had become domestic, the suggestion was made that the internationality of a receivable should be determined at the time of the conclusion of the contract of assignment and not at the time the receivable arose. That suggestion was objected to on the grounds that such an approach would result in changing the facts on the basis of which the creditor (assignor) determined whether to extend credit to the debtor and, if so, on what terms. It was explained that normally creditors would make such decisions at the time a receivable arose (which, under draft article 5(2), was the time of the conclusion of the original contract) and affecting such decisions through a rule such as the one suggested would increase uncertainty and, accordingly, the cost of credit.

156. The Working Group next turned to the question whether a receivable owed by several debtors or to several assignors would be international, even if only one debtor or only one assignor was located in a country other than the country in which the other party to the transaction was located, and to the question whether an assignment in which several assignors or several assignees were involved would be international, even if only one assignor and one assignee were located in different countries.

157. It was agreed that in the case of a multiplicity of assignors or assignees, it would be acceptable to consider an assignment or a receivable international even if only one assignor or one assignee was located in a country other than the country in which the other party to the transaction was located. Such an approach would allow assignors and assignees to plan in order to structure their assignment so that it would fall under the scope of the draft Convention or not. A note of caution was struck that such an approach might open ways for manipulations in financing transactions (e.g., in a syndicate of banks, the leading bank could include in the transaction a foreign bank and thus bring the transaction under the scope of the draft Convention). The suggestion was also made that the internationality of an assignment could be determined on the basis of the content of a transaction, e.g., on whether the majority of the receivables assigned would be international.

158. With regard to cases involving a multiplicity of debtors, the view was expressed that covering bulk assignments involving both domestic and international receivables would not raise problems in the context of priority issues, since, under draft articles 23 and 24, the law of the assignor's place of business would address all priority conflicts. In addition, it was stated, that, unless the draft Convention applied even if one debtor was located in a country other than the assignor's country, it would be difficult to find an acceptable criterion to limit the application of the draft Convention. However, it was pointed out that such an approach might inadvertently result in debtors being unable to predict whether the draft Convention would apply and possibly affect their rights and obligations. That result, it was said, could be mitigated by providing that the draft Convention would not apply to a debtor, unless that debtor

was located in a Contracting State and by including in the draft Convention an adequate debtor-protection system.

159. A related question was whether, in case of a multiplicity of assignors, all of them needed to be in a Contracting State for the draft Convention to apply. It was stated that, for the draft Convention to apply, it should be sufficient if even only one assignor was located in a Contracting State. Otherwise, it was observed, joint assignors could avoid the application of the draft Convention by including in the transaction an assignor located in a non-Contracting State. It was pointed out that the same question would be raised as regards the application of those provisions of the draft Convention that dealt with the rights and obligations of the debtor, in case of a multiplicity of debtors. The Working Group noted the problem but, for lack of sufficient time, referred its resolution to a future session.

160. In response to a question, it was observed that in case of a chain of subsequent assignments under the rule contained in paragraph (1), an assignment of a domestic receivable assigned from country A to country B would be covered as an international assignment of a domestic receivable (assignor and debtor in country A, assignee in country B), a further assignment in country B would also be covered as a domestic assignment of an international receivable (debtor in country A, subsequent assignor and assignee in country B), yet a further assignment from country B to country A would be covered as an international assignment of an international receivable (assignor in country B, assignee and debtor in country A), but a further assignment in country A would not be covered since it would be a domestic assignment of a domestic receivable (assignor, assignee and debtor in country A).

161. In view of the example mentioned above, a number of suggestions were made with regard to draft article 25 dealing with subsequent assignments. One suggestion was that, in order to ensure that the second assignment mentioned above would be covered, draft article 25 should be revised so as to provide that not only the subsequent assignee should be treated as the initial assignee but also that the subsequent assignor should be treated as the initial assignor. Another suggestion was that, in order to cover the last assignment mentioned above, draft article 25 should include a provision along the lines of article 11(1) of the Ottawa Convention. It was noted that according to that provision, once the initial assignment of a receivable was covered, any subsequent assignment of that receivable would also be covered (the principle of perpetuatio juris).

162. However, it was stated that, while the principle "once international, always international" was appropriately included in the Ottawa Convention, which covered only international receivables, it might lead to undesirable results in the context of the draft Convention, if applied to international assignments of domestic receivables as well. It was observed, for example, that, if such a rule were to apply in case the initial assignment was an international assignment of a domestic receivable, parties could assign a domestic receivable internationally in order to bring it within the scope of the draft Convention. In addition, it was said that the last assignee who had obtained a domestic receivable through a domestic assignment would have to examine all the previous assignments in order to determine which law governed the last assignment. In order to address that concern, the suggestion was made that, if the principle of perpetuatio juris were adopted in draft article 25, its application should be limited to cases in which the internationality of the assignment was apparent. Otherwise, it

was pointed out that, under such a principle, the debtor receiving a notification from the last assignee would have no way of knowing that the draft Convention applied to its rights and obligations.

163. After discussion, the Working Group approved the substance of paragraph (1) and requested the Secretariat to revise it in order to reflect the views expressed and the suggestions made.

Paragraph (2)

164. It was generally agreed that paragraph (2) should provide a clear definition of the term "place of business" or even replace that term with another term. It was stated that, in view of draft articles 1(a), 23 and 24, clarity as to the place of business of the assignor was crucial for the application of the draft Convention and for the determination of the law applicable to questions of priority. Similarly, it was said that clarity as to the place of business of the debtor was essential for the application of the draft Convention to the rights and obligations of the debtor. It was explained that uncertainty as to the place of business of the assignor or the debtor would run contrary to the main objective of the draft Convention, since it could increase the cost of credit.

165. In view of the fact that the assignment affected the rights of third parties, it was pointed out that the matter should be addressed not along the lines of texts dealing with contractual obligations (e.g., draft article 3(2), which was based on article 10 of the United Nations Convention on Contracts for the International Sale of Goods) but rather along the lines of texts dealing with relationships affecting the rights of third parties (e.g., article 2(b) and (f) and article 16(3) of the UNCITRAL Model Law on Cross-Border Insolvency).

166. As to the elements of such a definition of "place of business" or other similar term, a number of suggestions were made. One suggestion was that the place of business should be defined by reference to the centre of main interests, to an establishment and to the registered office of the parties. Another suggestion was that reference should be made to the place in which a transaction was concluded, or the head office of the relevant parties. Another suggestion was that the definition should cover the place in which invoices were issued and the place to which invoices were addressed. Yet another suggestion was that it should be left to the parties to the assignment to specify their places of business. If such an approach were followed, it was observed, a default rule would be needed to cover the situation in which the parties failed to specify the place of business of the assignor. In addition, it was said, a connecting factor for the determination of the place of business of the debtor would need to be specified. A related suggestion was that different connecting factors could be used, depending on the purpose for which the place of business of the parties needed to be specified. A note of caution was struck, however, that leaving the determination of the place of business to the parties might lead to uncertainty in case of a chain of subsequent assignments, if the parties to the various assignments specified different places of business.

167. After discussion, the Working Group requested the Secretariat to prepare a definition of the "place of business" or other similar term, presenting alternatives in order to reflect the suggestions made.

Article 4. Exclusions

168. The text of draft article 4 as considered by the Working Group was as follows:

"This Convention does not apply to assignments made:

"(a) for personal, family or household purposes;

"(b) solely by endorsement or delivery of a negotiable instrument;

"(c) as part of the sale, or change in the ownership or the legal status, of a business out of which the assigned receivables arose."

169. General support was expressed in the discussion for draft article 4. The Working Group engaged in a discussion as to whether additional types of receivables should be included in or excluded from the scope of the draft Convention.

170. The Working Group first focused on the question of covering tort receivables. It was noted that, in order to reflect a tentative decision made by the Working Group at its previous session to cover tort receivables (A/CN.9/434, paras. 74 and 81), the text of the draft Convention referred in several places to "the agreement or the court order" confirming a tort receivable. It was noted that that limitation of the tort receivables to be covered in the draft Convention was due to the fact that, in the absence of such a confirmation, a tort receivable arising from an illegal act was of no value for financing purposes.

171. In favour of addressing in the draft Convention the assignment of tort receivables, it was stated that there was a significant practice to assign tort receivables to insurers that was worth covering in the draft Convention. In addition, it was observed that, if the draft Convention were to exclude tort receivables, it would need to draw a distinction between tort and contractual receivables, a task which, in view of the diverging meanings given to those terms in the various legal systems, might not be easy to achieve.

172. On the other hand, a number of concerns were expressed with regard to covering tort receivables. One concern was that a contractual priority rule based on registration might not be appropriate in resolving the problem of competing rights in tort receivables. It was stated that insurers having paid a claim and looking for reimbursement through their insured's tort receivable may be prejudiced, if other financiers could obtain priority by way of registration. In addition, it was observed that a provision giving priority to the first assignee to register, if applied to tort receivables, might impair settlement in which all parties involved in a tort were supposed to participate (this would be particularly so if the registration would operate to establish a priority right even with regard to a future tort receivable). However, it was pointed out that that concern was sufficiently addressed through draft articles 23 and 24, after the Working Group's decision to turn them into conflict-of-laws provisions (see paras. 27 and 31 above).

173. Another concern was that the draft Convention might run counter to national law, under which tort receivables might not be assignable. That concern, it was said, was also addressed

by the fact that draft article 13 did not override statutory prohibitions of assignment. Yet another concern was that the volume of transactions involving financing on the basis of tort receivables may be so small that it may not be worth covering. It was recognized, however, that that matter could not be resolved without consultation with representatives of the insurance industry, as well as other relevant industries.

174. Yet another concern was that the assignment of tort receivables raised a number of complex issues that would need to be addressed by special rules. A number of examples were mentioned, including: the time when a tort receivable arose; the impact of such a rule on national law relating to time limitation for bringing claims; the way in which terms for the payment of a tort claim would be specified; the time of transfer of a future tort receivable; the way in which it could be provided that in tort receivables the assignor could not undertake any representation as to the absence of defences on the part of the debtor; and the way in which a tort receivable could be modified. While it was recognized that some of those issues were already addressed in the text of the draft Convention (e.g., draft article 5(2) dealing with the time at which a receivable might be deemed to arise, draft article 12(b) dealing with the time of transfer of future receivables and draft article 16(1)(c) limiting the representations of the assignor as to the absence of any defences on the part of the debtor to the assignment of contractual receivables), it was observed that other issues still remained to be addressed (e.g., the modification of a tort receivable).

175. After discussion, the Working Group confirmed its tentative decision that tort receivables should be covered and requested the Secretariat to reflect that decision by listing tort receivables in the scope provisions, possibly in draft article 2(2), and to prepare any additional provisions that might be necessary to address issues arising in an assignment of tort receivables.

176. The Working Group next turned to the question whether the assignment of receivables arising from deposit accounts should be covered. It was explained that such receivables involved single, large- or small-amount, claims of depositors against the depositary institution. Diverging views were expressed. One view was that such receivables should be excluded from the scope of the draft Convention. It was stated that the banking industry was already sufficiently regulated and might not need an additional set of rules. It was observed that, for the same reason, the assignment of receivables arising from investment securities, letters of credit and the entire cheque-collection system might need to be excluded as well. In addition, it was pointed out that some of the rules of the draft Convention might not be appropriate for deposit accounts. A number of examples were mentioned, including: recognizing the assignability of receivables arising from deposit accounts; requiring a bank to pay an assignee; and resolving priority questions between a bank with a right of set-off and an assignee or a bank and a cheque-holder on the basis of registration.

177. Another view was that there was no reason to exclude the assignment of receivables arising from deposit accounts. It was stated that such assignments were normal practice (e.g., when an account holder signed a cheque, under the law in some countries, it assigned a claim against the depositary institution). In addition, it was pointed out that, in the absence of a universal understanding of deposit accounts, it might be difficult to define them in order to exclude them from the scope of the draft Convention. Moreover, it was said that the concerns mentioned above might already be sufficiently addressed in draft article 18 (under which, in the

absence of adequate information as to the assignment, a bank did not need to pay an assignee of receivables arising from a deposit account) and draft articles 23 and 24 (under which conflicts of priority were referred to the law of the country in which the assignor, i.e. the account holder, had its place of business). A note of caution was struck, however, that if the assignment of receivables arising from deposit accounts were to be covered, the provisions of the draft Convention dealing with assignability and form of the assignment might need to be reconsidered.

178. After discussion, the Working Group requested the Secretariat to include at the appropriate place in the text of the draft Convention a list of receivables, the assignment of which could be included in the scope of the draft Convention, subject to further consultations with representatives of the relevant practices. It was suggested that the list should include, in addition to receivables arising from deposit accounts, receivables arising from investment securities, repurchase agreements, wire transfers, swaps and cheque-collection systems.

179. At the close of the discussion of draft article 4, the Working Group noted that the draft Convention on International Interests in Mobile Equipment being prepared by UNIDROIT was intended to address the assignment of receivables arising from the lease of aircraft, a matter that was intended to be covered by the draft Convention. It was observed that, in order to avoid such conflicts, close cooperation was called for between the Commission and UNIDROIT. It was suggested that such cooperation could take the form of representation at each other organization's meetings, exchange of documents and direct consultations between States represented in the Commission and experts participating in the work of UNIDROIT. It was agreed that the matter could be discussed in detail at the next session of the Working Group (New York, 2-13 March 1998), during which a more advanced draft of the draft Convention on International Interests in Mobile Equipment would be available.

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

180. The text of draft article 5 as considered by the Working Group was as follows:

> "For the purposes of this Convention:
>
> "(1) 'Original contract' means the contract between the assignor and the debtor from which the assigned receivable arises.
>
> "(2) A receivable is deemed to arise at the time when the original contract is concluded [or, in the absence of an original contract, at the time when it is confirmed in an agreement between the creditor and the debtor or in a court order].
>
> "(3) 'Future receivable' means a receivable that might arise after the conclusion of the assignment.

"[(4) 'Receivables financing' means any transaction in which value, credit or related services are provided for value in the form of receivables. 'Receivables financing' includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing.]

"(5) 'Writing' means any form of communication that [preserves a complete record of the information contained therein] [is accessible so as to be usable for subsequent reference] and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

"(6) 'Notification of the assignment' means a statement informing the debtor that an assignment has taken place.

"(7) 'Insolvency administrator' means a person or body, including one appointed on an interim basis, authorized to administer the reorganization or liquidation of the assignor's assets.

"(8) 'Priority' means the right of a party to receive payment in preference to another party.

"(9) Priority with regard to the receivables includes priority with regard to cash received upon collection or other disposition of the receivables, provided that the cash may be identified as proceeds of the receivables."

Paragraph (1)

181. As a matter of drafting, it was suggested that the term "original contract" should be replaced by a more appropriate term that would refer to the "contract generating the receivables". It was observed that the use of the term "original contract" might introduce uncertainty, since, in some relationships (e.g., deposit account relationship), it might not be easy to determine the contract from which the receivables arose. However, the prevailing view was that the term "original contract" was acceptable as long as it was defined. After discussion, the Working Group retained paragraph (1) unchanged.

Paragraph (2)

182. One suggestion was that paragraph (2) should be deleted, since it might not be appropriate to set the time when a receivable arose for all contracts. It was observed that the time when a receivable arose might differ depending on the type of the contract involved. However, it was generally agreed that the draft Convention could enhance certainty by including a uniform rule on the time when a receivable was deemed to arise, which was essential for the application of the draft Convention, the effect of a bulk assignment and the time of the transfer of a future receivable (draft articles 3(1), 11 and 12). Another suggestion was that, in order to avoid the misinterpretation that the word "concluded" required that the contract had to be performed, that word should be replaced by the words "is entered into, whether or not it has been earned by performance". In response, it was explained that the term "concluded" referred to the conclusion of the contract and not to its performance. After

discussion, the Working Group retained paragraph (2) unchanged. As to the language that appeared in paragraph (2) within square brackets, it was agreed that it should be retained within square brackets pending a final decision of the Working Group on the question whether tort receivables should be covered in the draft Convention or not.

Paragraph (3)

183. The Working Group approved the substance of paragraph (3) unchanged.

Paragraph (4)

184. The Working Group considered the question whether paragraph (4) should be retained or deleted. One view was that paragraph (4) should be retained. It was stated that paragraph (4) was consistent with the objectives of the draft Convention as set forth in the preamble. In addition, it was observed that paragraph (4) could prove useful in those legal systems that did not already have a legislative definition of receivables financing. Another view was that paragraph (4) should be deleted. It was pointed out that, in its present formulation, paragraph (4) was inconsistent with the scope of the draft Convention which covered practices beyond those described in paragraph (4) (e.g., the assignment of tort receivables). It was said that, if paragraph (4) were to be retained, it would need to be revised, in order to avoid such inconsistencies, or be placed in the preamble to further clarify the objectives of the draft Convention. After discussion, the Working Group decided to retain paragraph (4) within square brackets.

Paragraph (5)

185. The Working Group noted that the purpose of the definition contained in draft paragraph (5) was to allow for the use of other than paper-based means of communication. The definition clarified that, where the draft Convention required a communication to be given, or an act to be performed in writing, that requirement would be satisfied whenever the parties used any means that met the requirements of draft paragraph (5). As for the two options in brackets, it was noted that the second option had been drawn from article 6 of the UNCITRAL Model Law on Electronic Commerce.

186. While there was general support for the inclusion of a provision along the lines of draft paragraph (5), it was stated that the provision might require further elaboration, particularly as regards the notion of "authentication". It was suggested that that result could be achieved if the notion of "authentication" were to be replaced by a reference to signature as specified in article 7 of the UNCITRAL Model Law on Electronic Commerce. Subject to that change, the Working Group approved the substance of paragraph (5).

Paragraph (6)

187. As a matter of drafting, it was suggested that the word "statement" should be replaced by the word "writing", in order to align paragraph (6) with draft article 17(3). In response, it was observed that, in line with a decision made by the Working Group at its previous session (A/CN.9/434, para. 167), the legal regime of notifications was appropriately split between a short definition in paragraph (6) and the more detailed rules stated in draft article 17(3). After

discussion, the Working Group retained paragraph (6) unchanged and requested the Secretariat to consider including in paragraph (6) a cross-reference to draft article 17(3).

Paragraph (7)

188. It was observed that paragraph (7) used language consistent with the UNCITRAL Model Law on Cross-border Insolvency and the European Union Convention on Insolvency Proceedings. Pending final determination of the matter of the rights of an assignee as against an insolvency administrator under draft article 24, the Working Group deferred its decision on paragraph (7) to a future session.

Paragraph (8)

189. The concern was expressed that, while the language contained in paragraph (8) might be adequate in respect of assignments by way of security, it might be somewhat restrictive when applied to outright assignments. In order to address that concern, it was suggested that the words "to receive payment" should be deleted. In support of that suggestion, it was pointed out that in the field of factoring, for instance, recovery under assigned receivables was not limited to collection of cash proceeds, but extended to recovery of goods. In order to cover such proceeds, it was further suggested that the definition of "receivable" contained in draft article 2 should be revised along the lines of article 7 of the Ottawa Convention, or priority in respect of recovery of goods should be expressly included in paragraph (9). Subject to the deletion of the words "to receive payment", the Working Group approved paragraph (8).

Paragraph (9)

190. The concern was expressed that paragraph (9) might be too restrictive in referring only to cash proceeds. Another concern was that paragraph (9) might be read as conferring priority in proceeds independently of priority in the receivables. Yet another concern was that paragraph (9) was not properly placed in a provision dealing with definitions. In order to address those concerns, it was generally agreed that paragraph (9) should provide a definition of "proceeds", while the issue of the transfer of rights in proceeds could be dealt with in draft article 11 and the issue of priority in proceeds could be dealt with in draft articles 23 and 24. The Working Group deferred its decision on the contents of such a definition until it had completed its discussion of draft article 11 (see paras. 215-220 below).

Article 6. Party autonomy

191. The text of the draft article as considered by the Working Group was as follows:

> "(1) As between the assignor and the assignee, articles [...] may be excluded or varied by agreement.
>
> "(2) As between the assignor and the debtor, articles [...] may be excluded or varied by agreement.

"[(3) Nothing in this Convention invalidates an assignment which is valid under rules other than the provisions of this Convention]."

Paragraphs (1) and (2)

192. There was general support for the principle embodied in paragraphs (1) and (2) that party autonomy should not interfere with the certainty required with regard to the rights of third parties.

193. In response to a question, it was observed that, under paragraphs (1) and (2), a choice of the law of a non-Contracting State would result in excluding only those provisions of the draft Convention that dealt with the rights and obligations of the relevant parties agreeing on such an exclusion, and not the provisions dealing with the rights of third parties. In response to another question, it was pointed out that the effect of an agreement between the assignor and the debtor was not limited to receivables assigned after the assignee was notified of such an agreement (article 3(1)(b) of the Ottawa Convention), on the understanding that such agreement could not exclude the application of provisions dealing with the rights of the assignee.

Paragraph (3)

194. It was noted that the purpose of paragraph (3) was to ensure that the draft Convention would not result in invalidating assignment-related practices falling under national law. It was observed, however, that while there was general support in the Working Group for that principle, paragraph (3) might be inconsistent with draft article 10, if that article were to require written form for the assignment to be effective. After discussion, the Working Group retained paragraph (3) unchanged, subject to further consideration of the matter of consistency with draft article 10.

Article 7. Debtor's protection

195. The text of draft article 7 as considered by the Working Group was as follows:

"(1) Except as otherwise provided in this Convention, an assignment does not have any effect on the rights and obligations of the debtor.

"(2) Nothing in this Convention affects the debtor's right to pay in the currency and in the country specified in the payment terms contained in the original contract [or in any other agreement or court order giving rise to the assigned receivable]."

196. In view of the fact that the draft Convention might affect the rights and obligations of the debtor, it was suggested that the law applicable to those rights and obligations should be specified. That suggestion was objected to on the grounds that that concern would be met by the requirement that, for the provisions dealing with the debtor's rights and obligations to apply, the debtor had to be in a Contracting State. It was stated that a Contracting State, before adopting the draft Convention, would need to determine whether the draft Convention

contained an adequate debtor-protection system and one that would be compatible with fundamental policy considerations in that State. In addition, it was stated that the matter could be discussed in the context of specific provisions that might affect the rights and obligations of the debtor (e.g., draft articles 13, 18, 19(3), 20(2), 21 and 22). Moreover, it was pointed out that draft article 27 already dealt with the question of the law applicable to the rights and obligations of the debtor.

197. After discussion, the Working Group retained paragraph (1) unchanged. As to the question of the specific provisions of the draft Convention that might affect the rights and obligations of the debtor, the Working Group referred its resolution to the discussion of the individual articles of the draft Convention.

Paragraph (2)

198. The Working Group approved the substance of paragraph (2) unchanged. As to the language that appeared within square brackets, it was decided that it should be retained in square brackets pending a final decision by the Working Group on the question whether tort receivables should be covered in the draft Convention or not.

Article 8. Principles of interpretation

199. The text of draft article 8 as considered by the Working Group was as follows:

> "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

200. The Working Group approved the substance of draft article 8 unchanged.

Article 9. International obligations of the Contracting State

201. The text of draft article 9 as considered by the Working Group was as follows:

> Variant A
>
> "(1) [Subject to paragraph (2) of this article,] this Convention does not prevail over any international convention [or other multilateral or bilateral agreement] which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.

"(2) If an international convention [or other international or bilateral agreement] contains a provision similar to that contained in paragraph (1) of this article, this Convention prevails.

Variant B

This Convention prevails over any international convention [or other multilateral or bilateral agreement] which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention, unless a Contracting State makes a declaration under article 29."

202. Diverging views were expressed as to which variant was preferable. One view was that variant A should be preferred. It was stated that an approach along the lines of variant A would be consistent with the approach followed in a number of UNCITRAL texts (e.g., article 90 of the Sales Convention). In addition, it was observed that such an approach would result in avoiding conflicts with other conventions (e.g., the Ottawa Convention). However, it was pointed out that variant A did not allow the flexibility necessary for States to be able to benefit from improvements achieved in the context of future conventions. In addition, it was said that paragraph (2) could create conflicts with other conventions that might include a similar provision.

203. The prevailing view was that variant B was preferable, since it provided States with a right to decide which international convention should prevail. It was observed that States should have that right at any time and not only at the time when they adopted the draft Convention (see draft article 29). However, it was suggested that an exception should be made for the Ottawa Convention, in order to avoid placing on assignees the burden of having to determine not only whether a State had adopted the draft Convention or the Ottawa Convention, but also whether that State had made a declaration along the lines of draft article 29. In response, it was said that further consultations might be necessary in order to determine the potential for conflict with the Ottawa Convention. After discussion, the Working Group decided to retain variant B, possibly combining it with draft article 29 of the final clauses and to revisit the matter at a future session.

CHAPTER III. FORM AND EFFECT OF ASSIGNMENT

Article 10. Form of assignment

204. The text of draft article 10 as considered by the Working Group was as follows:

"(1) An assignment [in a form other than in writing is not effective, unless it is effected pursuant to a contract between the assignor and the assignee which is in writing] [shall be evidenced by writing].

"(2) [Unless otherwise agreed,] an assignment of one or more future receivables is effective without a new writing being required for each receivable when it arises."

Paragraph (1)

205. It was noted that paragraph (1) currently contained two options within square brackets: under the first option, an assignment would be invalid if it was not effected in writing; under the second option, the instrument of assignment itself did not need to be in writing, as long as the existence of the assignment could be evidenced by a writing, such as a list of receivables with the signature of the assignor or the financing contract document.

206. The Working Group considered at length the need for and the implications of the requirement of writing. As was the case at its twenty-sixth session (A/CN.9/434, para. 104), the prevailing view in the Working Group was in favour of requiring written form for the assignment to be effective. As regards the two options offered in paragraph (1), although some support was expressed in favour of requiring a writing for evidentiary purposes, there was general preference for the written form being a condition of the effectiveness of the assignment.

207. However, the concern was expressed that such an approach would run counter to the current practice in many legal systems and would inadvertently result in invalidating informal financing practices, such as those involving a prolonged retention of title. It was stated that the assignor and the assignee could protect their own interests and did not need a writing to warn them of the implications of the assignment. In addition, it was observed that, although written form could serve evidentiary purposes, it should not constitute the only permitted means of evidence. In order to address that concern, it was suggested that, at least, it should be provided that not all essential elements of the transaction had to be in writing; it would be sufficient if only the general terms and conditions of the contract were in writing; and that the notion of "writing" would not include the element of a signature. It was pointed out that, in practice, an assignment was often not effected by means of a written instrument, but resulted from an exchange of communications between the assignor and the assignee which might be followed by a writing or not.

208. With a view to addressing those concerns, the Working Group was invited to consider an alternative formulation to paragraph (1) along the following lines:

"Variant A

"(1) Subject to paragraph (2), an assignment is not effective, unless it is evidenced by a writing signed by the assignor which describes the receivables to which it relates.

"(2) An assignment which is not in compliance with paragraph (1) is effective if it complies with the rules concerning form of the assignment of the country of the assignor's place of business."

"Variant B

"The form of the assignment and the effect of any non-compliance with such form is governed by the law of the country of the assignor's place of business."

209. It was observed that the proposed variant A combined elements of a substantive rule on the form requirements with a conflict-of-laws rule as a fall-back solution, while variant B set forth a pure conflict-of-laws provision. After discussion, the Working Group requested the Secretariat to revise paragraph (1) of draft article 10 so as to reflect the generally preferred approach along the lines of the first set of bracketed language contained in paragraph (1), as well as the above-mentioned variants A and B. It was generally felt that, before resorting to a conflict-of-laws approach, the Working Group should try to find a generally acceptable substantive law solution to the problem.

Paragraph (2)

210. The Working Group noted that the purpose of paragraph (2) was to provide that, once there was a master agreement in writing, no further writing was needed for the assignment of future receivables to become effective. Subject to the elimination of the square brackets around the opening words, the Working Group approved the substance of paragraph (2).

Article 11. Effect of assignment

211. The text of the draft article 11 as considered by the Working Group was as follows:

"(1) [Without prejudice to the rights of several assignees obtaining the same receivables from the same assignor, the insolvency administrator and the assignor's creditors:]

"(a) an assignment of receivables that are specified individually is effective to transfer the receivables to which it relates;

"(b) an assignment of receivables that are not specified individually is effective to transfer receivables that can be identified as receivables to which the assignment relates, at the time agreed upon by the assignor and the assignee and, in the absence of such agreement, at the time when the receivables arise.

"(2) An assignment may relate to existing or future, one or more, receivables, and to parts of or undivided interests in receivables.

"(3) An assignment of receivables is effective to transfer the rights to cash received upon collection or other disposition of receivables, provided that the cash may be identified as proceeds of the receivables."

Paragraph (1)

Chapeau

212. The Working Group was agreed that the chapeau of paragraph (1) created uncertainty and should be replaced by a cross-reference to draft articles 23 and 24.

Subparagraphs (a) and (b)

213. In order to address both the transfer of title in the receivables and the creation of security rights in receivables, it was agreed that reference should be made in subparagraphs (a) and (b) to "the transfer of rights in receivables" rather than to the "transfer of receivables". Subject to that change, the Working Group approved the substance of subparagraphs (a) and (b).

Paragraph (2)

214. The Working Group approved the substance of paragraph (2) unchanged.

Paragraph (3)

215. The Working Group recalled its decision to include a definition of "proceeds" in draft article 5 and to address the issue of the transfer of rights in proceeds in draft article 11 and the issue of priority in proceeds in draft articles 23 and 24. It also recalled its decision to consider the contents of a definition of "proceeds" in the context of its discussion of draft article 11 (see para. 190 above).

216. As to the definition of "proceeds", language was suggested along the following lines: "Proceeds includes whatever is received upon the collection or disposition of the receivables or of the proceeds." With regard to the issue of the transfer of rights in proceeds, it was suggested that paragraph (3) should be replaced by wording along the following lines: "An assignment of receivables also assigns the assignor's rights to their proceeds". Alternative proposals made included the following: "[All movable] property received on collection, discharge or disposition is assigned as part of the receivables". With regard to priority in proceeds, it was suggested that it could be dealt with in the same way as priority in receivables (which under draft articles 23 and 24 was left to the law of the country in which the assignor had its place of business). In addition, it was suggested that the issue of identification of proceeds and traceability (in case the proceeds were commingled with other similar assets, e.g., when money was paid in a deposit account) could be left to the law of the country in which the assignor had its place of business.

217. In order to emphasize the importance of covering proceeds in the draft Convention, it was stated that, in practice, an assignee rarely received cash upon collection of the receivable. Debts were more frequently discharged by credit transfers or by means of cheques, promissory notes or other negotiable instruments delivered by the debtor to the assignee. In addition, it was observed that, if the debtor retained the possibility to discharge its debt by delivering or returning goods directly to the assignor, the rights in such goods should vest with the assignee by virtue of the assignment. It was added that, in bulk assignments of receivables, often a

proportion of the receivables was actually discharged through the delivery of goods, for instance, because the debtor returned certain goods for non-conformity with the original contract.

218. While it was agreed that the assignee should be given effective rights to obtain whatever was received in satisfaction of the receivable, differences were identified as to legal concepts and methods in achieving the desirable result. It was stated that in some legal systems the asset referred to as "proceeds" was a separate asset subject to a different legal regime and could not be brought under the legal regime governing receivables. In those legal systems, it was observed, the assignee would have a personal claim to obtain the asset received by the assignor in payment of the receivable (which could be, e.g., a claim based on the principles of unjust enrichment) but not a property right in that asset (i.e. the assignee had a right ad personam and not in rem in that asset). In addition, it was said that, where security over goods and other property were offered as a collateral to the assignment, the assignee's rights to such assets were covered under draft article 14.

219. Moreover, it was pointed out, in some legal systems a sum paid into an account of the assignor was deemed to be a fungible asset which could not be separated as pertaining to one particular receivable. It was explained that, in those legal systems, the assignee lacked title in the proceeds; it only had a claim against the assignor, and would not have the right to trace the proceeds. Accordingly, it was suggested that a general provision along the following lines should be considered: "If payment of the receivable due under the underlying contract is received by the assignor, the assignor [shall] [is bound to] return to the assignee what it has received." It was stated that, under such an approach, conflicts of priority would be resolved by the law applicable to the type of payment involved in each case.

220. After deliberation, the Working Group requested the Secretariat to formulate alternative provisions reflecting the suggestions mentioned above for consideration by the Working Group at its next session.

Article 12. Time of transfer of receivables

221. The text of draft article 12 as considered by the Working Group was as follows:

> "[Without prejudice to the rights of the insolvency administrator and the assignor's creditors:]
>
> "(a) a receivable arising up to the time of the assignment is transferred at the time of the assignment; and
>
> "(b) a future receivable is deemed to be transferred [at the time agreed upon between the assignor and the assignee and, in the absence of such agreement,] at the time of the assignment [or, in the case of a receivable arising from an agreement other than the original contract or from a court order, at the time when it [arises] [becomes payable]]."

Opening words

222. It was observed that the opening words of draft article 12 might undermine the rights of an assignee in case a national insolvency law took a very restrictive approach as to the rights of an assignee as against the administrator in the insolvency of the assignor. In response, it was noted that the approach of the Working Group, reflected in draft article 24(5) and (6), was that, while the draft Convention could recognize the basic effectiveness of an assignment, thus having a limited effect on the rights of the insolvency administrator, it could not unduly interfere with those rights of the insolvency administrator existing under national insolvency law. After discussion, in line with its decision with regard to the opening words of draft article 11(1), the Working Group decided that the opening words of draft article 12 should be replaced by a cross-reference to draft article 24.

Subparagraph (a)

223. The Working Group approved the substance of subparagraph (a) unchanged.

Subparagraph (b)

224. There was general support for the principle that a future receivable should be deemed as having been transferred at the time of the contract of assignment. It was observed that, in view of the risk that, after the conclusion of the contract of assignment, the assignor might assign the same receivables to another assignee or become insolvent, it was essential to set the time of the transfer of the assigned receivables at the time of the conclusion of the contract of assignment. It was stated that, in practice, the assignee would acquire rights in future receivables only when they arose, but in legal terms the time of transfer would be deemed to be the time of the contract of assignment.

225. However, it was pointed out that, in order to avoid creating uncertainty as to the time of the transfer of the assigned receivable, the time of the contract of assignment should be specified. The suggestion was made that that time should be the time mentioned in the assignment contract or, if the assignment contract was not in writing, the time determined on the basis of any other writing or other means of evidence. As a matter of drafting, it was suggested that the first set of bracketed language that appeared in subparagraph (b) within square brackets should be revised so as to ensure that the parties could not manipulate the transaction by setting as the time of transfer a time earlier than the time of the conclusion of the assignment contract.

226. Subject to the suggested changes, the Working Group approved the substance of subparagraph (b). As for the second set of bracketed language, the Working Group decided that it should be retained within square brackets, pending final determination by the Working Group of the question whether tort receivables should be covered by the draft Convention or not.

Article 13. Agreements limiting the assignor's right to assign

227. The text of draft article 13 as considered by the Working Group was as follows:

> "(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor limiting in any way the assignor's right to assign its receivables.
>
> "(2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement limiting in any way the assignor's right to assign its receivables, but the assignee is not liable to the debtor for such a breach."

Paragraph (1)

228. There was general support in favour of the principle embodied in paragraph (1). It was pointed out that a provision along the lines of paragraph (1) would result in an enhanced access to lower-cost credit for small- and medium-size enterprises on which often anti-assignment clauses were imposed by large enterprises.

229. However, the concern was expressed that paragraph (1) might override national law rules aimed at protecting the debtor. In order to address that concern, the suggestion was made that paragraph (1) should allow States to express a reservation as to the application of paragraph (1) along the lines of article 6 of the Ottawa Convention. In response, it was noted that paragraph (1) was the result of a compromise between those legal systems that invalidated the assignment and those legal systems that invalidated anti-assignment clauses. In addition, it was noted that the concerns expressed might be addressed by the debtor-protection provisions contained in the draft Convention. Moreover, it was noted that States considering the adoption of the draft Convention would need to weigh the potential inconvenience to the debtor as a result of the assignment against the advantage of increased availability of lower-cost credit. It was stated that another way of dealing with the matter was to allow the debtor to discharge its obligation by paying the assignor in case an assignment was made in violation of an anti-assignment clause. It was recalled that that suggestion had been briefly discussed at the twenty-fifth session of the Working Group (A/CN.9/432, paras. 125-126).

230. It was observed that, in addressing only contractual prohibitions of assignment, paragraph (1) left some uncertainty as to its effect on statutory prohibitions. In order to address that problem, it was suggested that language along the following lines should be included in paragraph (1): "Nothing in this article affects any limitations to the assignor's right to assign its receivables that does not result from an agreement between the assignor and the debtor". It was observed that, for the suggested language to provide the desirable degree of certainty, it would need to be supplemented by a conflict-of-laws rule specifying the law applicable to statutory prohibitions of assignment (or legal assignability). It was pointed out that, while contractual assignability would be subject to a single law (i.e. the law governing the assigned receivable), legal assignability would be subject to different laws depending on the country in which the debtor had its place of business. As a result, in a bulk assignment involving receivables owed by debtors located in different countries, the assignee would have to look at

the law of the country of each debtor in order to determine whether there were any legal limitations of the assignment. In view of the difficulty in dealing with that issue, the Working Group confirmed its earlier decision not to deal with statutory prohibitions of assignment (A/CN.9/434, para. 136) and approved the substance of paragraph (1) unchanged.

Paragraph (2)

231. General support was expressed in favour of paragraph (2). It was understood that paragraph (2) did not create liability in cases where the law applicable to the original contract gave no effect to anti-assignment clauses. However, it was observed that, as a result of the approach taken in paragraph (2) to preserve the validity of anti-assignment clauses and the assignor's potential liability for their violation, parties which may be liable for concluding an assignment in violation of an anti-assignment clause would be less inclined to assign their receivables, thus being deprived of access to lower-cost credit. After discussion, the Working Group approved the substance of paragraph (2) unchanged.

Article 14. Transfer of security rights

232. The text of draft article 14 as considered by the Working Group was as follows:

> "(1) Unless otherwise provided by law or by agreement between the assignor and the assignee, any personal or property rights securing payment of the assigned receivables are transferred to the assignee without a new act of transfer.
>
> "(2) Without prejudice to the rights of parties in possession of the goods, a right securing payment of the assigned receivables is transferred to the assignee, notwithstanding any agreement between the assignor and the debtor, or the person granting the security right, limiting in any way the assignor's right to assign such a security right.
>
> "(3) Paragraph (1) of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any security rights."

Paragraph (1)

233. The concern was expressed that the reference contained in paragraph (1) to "law" might introduce uncertainty. In order to address that concern, it was suggested that reference should be made instead to the law of the assignor's place of business. That suggestion was objected to on the grounds that the application of the assignor's place of business might not be appropriate in all cases. It was stated that often the application of the law governing the security right might be more appropriate (e.g., in case of property security rights which should be governed by the lex rei sitae).

234. In order to cover assignments in which the receivable was discharged through the return of goods by the debtor or their recovery by the assignor, it was suggested that after the words "property rights" language along the following lines should be included: "including the

assignor's rights to any goods subject to the original contract that may be returned by the debtor or recovered by the assignor". The Working Group requested the Secretariat to include that suggestion at the appropriate place in the text of the draft Convention for consideration at the next session of the Working Group. After discussion, the Working Group approved the substance of paragraph (1) unchanged.

Paragraphs (2) and (3)

235. For lack of sufficient time, the Working Group deferred its discussion of paragraphs (2) and (3) to its next session.

IV. FUTURE WORK

236. A number of issues were suggested for consideration during the upcoming deliberations of the Working Group. Those included: the question of the scope of the draft Convention, including whether the assignment of tort receivables, receivables arising from deposit accounts, repurchase agreements, the check-collection system and swaps would be covered; the question whether proceeds of receivables, as well as the assignor's rights under the original contract should be covered; the matter of a more specific definition of the place of business, which was important for achieving certainty as regards the application of the draft Convention and the rights of third parties; the question of the form of assignment; the relationship between the draft Convention and national insolvency law; the question whether the substantive law provisions of the draft Convention needed to be supplemented by a set of conflict-of-laws rules; and the question of the role and the content of the optional part of the draft Convention.

237. It was noted that the next session of the Working Group was scheduled to take place in New York from 2 to 13 March 1998.

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